

**Judgments
of the Administrative Tribunal of the
International Labour Organization:**
92nd Session
(October 2001-January 2002)



International Labour Office
Geneva

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The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against international organisations that have recognised its jurisdiction. These organisations are the following (in order of recognition):

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organisation for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)

International Organization for Migration (IOM)
International Centre for Genetic Engineering and Biotechnology
(ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)
Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies
Preparatory Commission for the Comprehensive Nuclear-Test-Ban
Treaty Organization (CTBTO PrepCom)
European and Mediterranean Plant Protection Organization (EPPO)
International Plant Genetic Resources Institute (IPGRI)

NINETY-SECOND SESSION

In re Franks (No. 5)

Judgment No. 2079

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr Nigel Malcolm Franks against the European Patent Organisation (EPO) on 27 November 2000, the complainant's additional submissions dated 6 January 2001 and submitted on 19 January, the EPO's reply of 19 March, the complainant's rejoinder of 19 April and the Organisation's surrejoinder of 20 July 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a British citizen who was born in 1961. At the material time he was a search examiner at the European Patent Office, the EPO's secretariat. He held grade A3 and was a member of the local Staff Committee.

Owing to an illness, diagnosed as repetitive strain injury, the complainant had been fully or partly unfit for work since June 1997. A report issued by the Office's medical officer on 24 November 1998 declared him 75 per cent fit for work provided he did not have to use his hands. The same day, the complainant wrote to the President of the Office

explaining that the only work he could do was staff representation work, but because EPO policy restricted such activities to 50 per cent of normal working hours he had only been working half-time. He sought authorisation to devote 75 per cent of office time to Staff Committee work. In the event that his request was not allowed he asked that his letter be considered as an internal appeal. This appeal was subsequently taken up by the Appeals Committee under the reference RI/121/98.

Meanwhile the medical officer issued a further report on his case on 27 January 1999. As a result of that report, on 28 January the Office placed the complainant on compulsory sick leave until further notice. That decision affected the date at which his statutory period of sick leave on full pay under Article 62(6) ended and extended sick leave under Article 62(7) began. That the complainant was completely unfit for work from 2 March 1999 is not in dispute.

By a notification of 6 April 1999 a personnel officer informed the complainant that on 16 April he would reach the maximum period of sick leave on full pay and that from 17 April he would be on extended sick leave, would receive only half of his basic salary and would no longer be entitled to advancement or annual or home leave. He went on to say that if it appeared that the complainant's incapacity was the result of a "serious illness" as defined in Article 62(7) he would retain entitlement to the whole of his basic salary. He also gave him the name of the doctor appointed by the Office to the Invalidity Committee and asked him to let the Office know which doctor he appointed.

The complainant lodged two more internal appeals. In one, dated 27 April 1999 and registered under the reference RI/62/99, he sought the quashing of the Office's decision to put him on compulsory sick leave. In the other, dated 3 July 1999 and registered as RI/79/99, he challenged the decision to place him on extended sick leave from 17 April and wanted the Office to make good the financial loss he had suffered since that date.

A report of the Invalidity Committee, dated 6 March 2000, indicated that the complainant was considered to be suffering from a disability comparable to a severe illness. The medical practitioner appointed by the Office did not sign the report.

In its report of 5 July 2000 the Appeals Committee recommended rejecting the first appeal as being devoid of substance on the grounds that the complainant had been found to be 100 per cent unfit for work as from 2 March 1999. New rules on the time allocated to staff representation work had come in on 1 July 1999 and it served no purpose in law to clarify how much time he could have devoted to such activities under the old rules. It recommended partially allowing the other two appeals. It took the view that the decision to place the complainant on compulsory sick leave was unlawful and he was due compensation for material injury. It recommended recalculating the date at which his maximum period of sick leave on full pay ended. The President endorsed the Committee's recommendations. In a decision dated 29 August 2000 he told the complainant that the date marking the beginning of his extended sick leave had been changed from 17 April 1999 to 11 May, and the Office would refund the part of his salary erroneously withheld, plus interest. That is the decision the complainant impugns.

In a fax of 6 September 2000 to the President the complainant asked when he could resume work. In a reply of 10 October the President told him that only the Invalidity Committee could decide. On 17 November he received a copy of another report from the Invalidity Committee in which, this time, two of the three members found that the disability he was suffering from was not comparable to a severe illness. As a result of that report, on 20 November the Office informed him that it would continue paying him only half his salary during his extended sick leave. He lodged a complaint with the Tribunal on 27 November. On 13 December 2000 he resumed work half-time.

The complainant filed further submissions with the Tribunal on 19 January 2001. The same day he sent a copy of them to the President of the Office contesting the decision of 20 November 2000. In an accompanying letter he asked if the President would waive the internal appeal process and allow his direct appeal to the Tribunal. In the event of his request being denied he wanted his submissions to be treated as a new internal appeal.

B. Taking up the matter of his first appeal, the complainant submits that he had a "clear legal interest" in contesting the Office's persistent refusal to allow him to devote more than 50 per cent of office time to Staff Committee work. The medical officer's opinion was that such duties constituted a suitable way of allowing him to eventually return to work full-time. In placing him unlawfully on compulsory sick leave and by refusing to allow the gradual return to work envisaged by his doctors the EPO was in breach of its duty of care towards him and thereby caused him moral injury.

Turning to his other two appeals, he says that by correcting the date on which the statutory period of sick leave on full pay expired the impugned decision gave him only partial satisfaction. At no time since 22 January 1999 has a medical adviser expressed the opinion that his condition requires compulsory sick leave. The decision to put him on such leave was taken in haste. The Office again breached its duty of care by failing to consult the medical officer prior to taking the decision. Nor was he himself heard before the decision took effect. He claims he suffered moral injury. His condition worsened owing to delays in both the Appeals Committee and Invalidity Committee procedures. He pleads breach of equal treatment in that three other officials having a similar disability were not placed on compulsory sick leave. In his opinion, the EPO discriminated against him on account of his being a staff representative.

The complainant seeks the following redress: (1) the quashing of the decision denying his request to work for more than 50 per cent of office time on Staff Committee work; (2) the quashing of the decision to place him on compulsory sick leave; (3) the "implementation" of the opinion expressed in the Invalidity Committee's report of 6 March 2000 that he is suffering from a serious illness within the meaning of Article 62(7), and the payment, with interest, of sums withheld since 11 May 1999; (4) compensation for loss of entitlement to promotion, annual leave and home leave; (5) moral damages for discrimination against him and for delays and "mistakes" in the proceedings before the Appeals Committee as well as the Invalidity Committee; and (6) costs.

In his additional submissions the complainant states that in November 2000, just a matter of days before the expiry time for filing a complaint

with the Tribunal, the Invalidity Committee issued what the Administration was treating as a "final" report on his case. He argues that the question of whether his illness constitutes a "serious illness" under the terms of Article 62(7) is crucial to his complaint. If it does, then he was entitled to receive his full salary for the whole period during which he was 100 per cent unfit for work after the expiration of his maximum sick leave on 11 May 1999. In his view uncertainty arose among the members of the Invalidity Committee because the question at issue was incorrectly phrased on the pre-printed form they had to fill in when examining his case; it did not properly reflect Article 62(7). Again the EPO violated its duty of care and the procedure before the Invalidity Committee was unnecessarily prolonged. He suffered material loss through being on half pay during that time. He gives details of what he perceives to be other procedural errors in the Invalidity Committee proceedings, for which he claims moral and material damages.

C. The Organisation takes the view that the complaint is irreceivable in part and is also devoid of merit. It is receivable only insofar as the complainant impugns the decision to reject his first internal appeal. The EPO construes the further submissions he filed as a change of the relief sought in his third internal appeal relating to the expiry date of the statutory period of sick leave on full pay. It adds that it did not allow the complainant's request to file his new appeal directly with the Tribunal.

The EPO maintains that his first internal appeal showed no cause of action. Moreover, the complainant had been declared 75 per cent fit, so to devote 75 per cent of office time to staff representation duties would have meant working at 100 per cent of his total capacity. His claim became devoid of merit on 2 March 1999 when he was found to be 100 per cent unfit for work. Even if the medical officer found that staff representation work would be suitable for the complainant, such an opinion was not binding on the EPO.

With regard to his second appeal – against the decision to put him on compulsory sick leave – it argues that since he impugned a decision dated 28 January 1999 and he was found to be 100 per cent unfit for work on 2 March 1999, his appeal could only concern that period. The

President endorsed the Appeals Committee's recommendation to allow a recalculation of the end date of the twelve-month period of sick leave on full pay; that amounted to a *de facto* quashing of the decision to put the complainant on compulsory sick leave. The part of his complaint based on that appeal has become devoid of subject matter. The part based on his third appeal is irreceivable for it shows no cause of action. The correct date for the end of the twelve-month period of sick leave on full pay was 11 May 1999. The Office paid him the corresponding sums due.

His claims to the implementation of the report of 6 March 2000 and to loss of entitlement to promotion are unacceptable extensions of his third internal appeal and as such are irreceivable. The EPO points out that the report of 6 March was only "provisional". The three members of the Invalidity Committee decided to consult a fourth practitioner, which ultimately led to the report of November 2000 – the only "valid" report. There are no grounds for an award of moral damages. None of the alleged flaws in the Invalidity Committee proceedings are founded and the internal appeals procedure was carried out within a reasonable time frame. It denies that there was inconsistency in the wording of the form given to the doctors on the Invalidity Committee. His allegation of discrimination lacks credibility, and he was not the victim of unequal treatment.

D. In his rejoinder the complainant contests several arguments put forward by the Organisation and maintains his pleas and his claims for relief. He argues that there was justification for allowing direct appeal to the Tribunal since the requirement for filing an internal appeal does not apply to decisions taken after consultation of the Invalidity Committee.

E. In its surrejoinder the Organisation maintains in full the submissions it made in its reply. Given that the complainant argues that there were flaws in the Invalidity Committee's reporting proceedings, prior consultation of the Appeals Committee was deemed necessary.

CONSIDERATIONS

1. The complainant challenges the decision of 29 August 2000 of the President of the European Patent Office, which disposed of three internal appeals brought by the complainant. The appeals arose as follows:

(a) On 10 June 1997 the complainant was diagnosed with repetitive strain injury (RSI). On 24 November 1998 the Office's medical officer found him to be fit to work 75 per cent of normal working hours provided he did not have to use his hands. The same day he sought authorisation to work at 75 per cent for the Staff Committee, of which he was a member. The refusal of this request led to internal appeal RI/121/98.

(b) On 27 January 1999 the medical officer further advised that the complainant was 75 per cent fit for work, but with a 100 per cent incapacity to use his hands (mentioning that he could not use a mouse or keyboard, nor lift or leaf through files, or turn pages). On the basis of this report the Office informed the complainant on 28 January 1999 that, as it considered him to be completely unable to perform his duties, he was on compulsory sick leave as from that date. This decision led to an internal appeal registered as RI/62/99.

(c) On 6 April 1999 the complainant was informed that on 16 April he would reach the maximum period of sick leave on full pay (twelve months), and that pursuant to Article 62(6) and (7) of the Service Regulations he would with effect from 17 April 1999 receive, during his extended sick leave, only half of his basic salary, plus full allowances. The complainant was asked to appoint a doctor of his choice for the Invalidity Committee, which in due course he did. On 3 July 1999, the complainant lodged an internal appeal against the decision of 6 April. It was registered as RI/79/99.

2. The Invalidity Committee issued a report dated 6 March 2000. A further report with different conclusions was issued in November 2000. The parties disagree as to the validity and meaning of these two reports. The reports were issued long after the dates of the complainant's internal appeals which form the basis of the present complaint, and thus are beyond

the scope of the present judgment. Since these reports might be at issue in a pending internal appeal, the Tribunal will refrain from any comment on them.

3. The Appeals Committee unanimously recommended on 5 July 2000 rejecting appeal RI/121/98 as devoid of substance and allowing appeals RI/62/99 and RI/79/99 to the following extent: the Office should recalculate the end of the maximum period of sick leave on full pay, as the decision to put the complainant on compulsory sick leave was not correct; and it should pay him any sums erroneously withheld. It also recommended reimbursing the complainant, to the extent that his appeals succeeded, the costs he incurred in the appeals procedure.

4. By a letter dated 29 August 2000 the President informed the complainant that he had decided to follow the unanimous recommendation of the Appeals Committee and reject appeal RI/121/98 as without substance, and give satisfaction to the other two appeals by recalculating the date on which his extended sick leave began (it would begin on 11 May 1999 instead of 17 April) and refunding the part of his salary withheld, plus interest. That is the impugned decision.

5. On 12 December 2000 the Office's medical officer certified that the complainant was fit to return to work on a 50 per cent basis. The complainant did so the following day.

6. The complainant argues that the decision which was the subject of internal appeal RI/121/98 was unlawful because it did not take into account Article 34(2) of the Service Regulations which provides that the "duties undertaken by members of the Staff Committee ... shall be deemed to be part of their normal service".

7. As regards the decisions which were the subject of appeals RI/62/99 and RI/79/99, the complainant urges that his medical condition did not warrant the decision to place him on compulsory sick leave. To the extent that this argument calls for the interpretation of the medical officer's report of 27 January 1999, the complainant has not shown that the

Organisation was wrong to consider that a complete inability to use his hands for any purpose whatsoever amounted, in his case, to a total disability. To the extent that he contests the correctness of that report, the Tribunal considers that it is a medical question which can only be determined by the Invalidity Committee. The balance of the complainant's arguments with regard to these two internal appeals is devoted entirely to matters relating to the alleged flaws in the proceedings and conclusions of the Invalidity Committee and to alleged delays in the internal appeals procedure.

8. It is clear that the complaint as pleaded is irreceivable insofar as it relates to the decisions giving rise to these last two appeals. If the complainant still has grievances regarding the proceedings before the Invalidity Committee - which appears to be the case since in his further submissions he queries the role and status of some members of the Committee, whether it is the report of March 2000 or that of November 2000 which can be acted upon and whether either report is vitiated by defects of form or substance - then he must exhaust his internal remedies by way of a valid internal appeal. His arguments raise serious issues of fact on which the Tribunal will not rule until it has had the benefit of the views of the internal appeals body. His claims for moral damages resulting from these matters are likewise irreceivable in the context of the present complaint.

9. As for the complainant's claim regarding the decision which led to internal appeal RI/121/98, it is without merit. In the first place, the complainant misinterprets the medical officer's report which does not, as the complainant suggests, state that he is fit to perform Staff Committee duties. In fact, the medical officer only enumerated the activities which the complainant could perform (reading without turning pages, speaking at meetings and training sessions or any activity not requiring the use of his hands), and concluded that the complainant could only gradually resume his work as an examiner over a long period of time. The report was silent on whether he could perform staff representation duties. The Tribunal cannot, on the evidence it has before it, conclude whether or not the

complainant could have carried out such duties. The complainant, therefore, has not discharged the burden of proof.

10. Although he refers to Article 34(2) of the Service Regulations which provides that work for the Staff Committee shall count as part of "normal service", the complainant overlooks the fact that that provision has for many years consistently and correctly been interpreted – and applied by the EPO – as preserving its own right to direct the work of the staff. The Organisation's intention was clear from a letter of 12 June 1979 from the President of the Office to the Chairman of the Central Staff Committee (CSC), which read as follows:

"The staff committees may divide up [time allocated for staff representation] among their members or other employees (experts) as they see fit, subject to the following proviso: no employee may be released for more than 50% of his normal duties apart from the CSC chairman, who may be released for up to 75%."

A similar provision was later incorporated into the Service Regulations.

11. The complainant was not chairman of the Staff Committee. In addition, since he was only fit to work 75 per cent of normal hours, his request to work at 75 per cent on staff committee duties was in fact a request to devote 100 per cent of office time to that function. As such it was manifestly inadmissible.

12. The complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

***In re* Becker**

Judgment No. 2080

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Horst-Vincent Daniel Becker against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 17 August 2000 and corrected on 4 October, the OPCW's reply of 16 December 2000, the complainant's rejoinder of 4 April 2001, and the Organisation's letter of 24 July 2001 in lieu of a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1941, was recruited in 1993 by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons in The Hague, the Netherlands, as the Head of the Budget and Finance Branch at grade P-5. His fixed-term contract was renewed on a yearly basis until 23 May 1997 when the Preparatory Commission ceased to exist and the OPCW was established. He was then accorded a three-year fixed-term contract for the same post with the OPCW, effective from 24 May 1997.

On 23 April 1998 Information Circular TS/IC/20 informed all fixed-term staff members of the Director-General's intention to extend

"initial three-year appointments for an additional period of two years, provided that the staff member concerned has fully demonstrated that he or she meets the high standards of efficiency, competence and integrity required by the Convention [on the Prohibition of Chemical Weapons]" and that compliance with these standards would be determined "first and foremost" on the basis of performance appraisals. The complainant's overall performance was rated "Very Good" in his performance appraisal for the period from 2 October 1997 to 1 October 1998. In 1998 a job classification exercise was carried out for the complainant's post.

The Director-General informed the complainant in a letter of 6 October 1999 that his contract would not be renewed upon expiry, for a reason not related to his performance but rather to the belief that, in the future, an individual with "different skills and experience" would be required. The post was advertised in an international newspaper on 27 December 1999.

On 18 November 1999 the complainant requested the Director-General to reconsider his decision. In support of his request he stated the fact that he met the criteria set out in Information Circular TS/IC/20 and that he did possess the necessary skills and experience for the post as it would be developed in the future. The Director-General replied on 10 December that the decision of 6 October was maintained. The complainant wrote again to the Director-General on 22 December 1999 asking for more specific information on the future requirements of the post, as well as the reasons why the Director-General did not believe that he possessed the necessary skills and experience. The Director-General did not reply.

On 11 January 2000 the complainant filed an appeal with the Appeals Council. In its report of 18 May the Appeals Council recommended rejecting the appeal and the Director-General did so on 23 May 2000. That is the impugned decision.

B. The complainant contends that the decision not to renew his contract is illegal as it was based on "clearly false conclusions drawn from the dossier". Neither the Organisation nor the Appeals Council has been able to establish the reality of the differences between the complainant's post and the "new" one. He submits that in fact, his request for specific information in this regard was ignored by the Organisation and all the Appeals Council

had to say on the issue was that since the job description for the post in question had been changed the Director-General had both the right and the obligation to re-advertise the post. The complainant makes a two-fold rebuttal of these assertions. First, a job description for his post was issued in 1994 by the Preparatory Commission and not the OPCW, (a different organisation), and is therefore not valid. Secondly, that job description was not used as a basis for the classification of his post in 1998. In 1998 his supervisor certified the requirements of the complainant's post in a document used for the reclassification exercise; nevertheless the Organisation has argued that this was neither an official document nor an official job description. The complainant submits that there are no substantial differences between the requirements contained in this document, the duties and responsibilities performed by him, and the post as later advertised. To the extent that the new post contained different or expanded duties and responsibilities, he was either already carrying them out or had the required skills and experience. Even if it could be established that there were substantial differences, the procedure followed by the Organisation was flawed: if the advertised post was "new", then the complainant's post should have been abolished and he should have been granted all the guarantees and entitlements resulting from an abolition of post.

The complainant also argues that the impugned decision constitutes a breach of his legitimate expectations and of the principle of good faith. He clearly met the criteria set out in Information Circular TS/IC/20, and contrary to the Organisation's position, this circular was not just "a general statement subject to a whole range of qualifying factors". In addition, he cites the Tribunal's case law to support his argument that an organisation is not free to use the "natural end" of a contract to get rid of an employee; it must provide proper reasons and ensure that the rights of the employee have been respected. He submits that he has suffered both moral and financial injury.

The complainant requests the Tribunal to quash the Director-General's decision of 23 May 2000 and to award him two years' gross salary (including payment of indemnities) in material damages and an appropriate sum in moral damages. He also claims costs.

C. In its reply the Organisation submits that under the terms of the Paris Resolution the OPCW is the successor organisation to the Preparatory Commission. As there was no "legal hiatus" between the two, the 1994 post description continued to be valid.

In its opinion, there is no valid reason in law why the complainant's contract should have been renewed simply because his performance in the post "had been judged good"; past performance does not guarantee good future performance in a post with changed functions. It was within the Director-General's discretion to consider someone with a different combination of skills for the new post, and the complainant could have had the opportunity to demonstrate to an interviewing panel that he would have been the best candidate to fill the post. However, he did not submit an application even when he became aware that the post had been advertised.

It also finds no legal merit in the fact that the complainant has submitted his performance appraisal reports with his complaint, as his non-renewal of contract was not based on his performance in the former post. The fact that he performed well during the period 1993-1999 does not mean that he would have been the best person to carry out the expanded and more complex duties and responsibilities of the new post. Although his skills were suitable at the time, they would not have been suitable in the future. The Director-General was looking for someone "more familiar and pro-active with up-to-date budgetary and innovative finance concepts" and it was within his discretion to decide that this did not describe the complainant.

The OPCW submits that the complainant has not proven that there was any arbitrary use of authority or any other error which would allow the Tribunal to exercise its power of review. Furthermore, there has been no breach of his legitimate expectations nor the principle of good faith: the circular in question did not prescribe any law, nor did it represent a contractual promise. It merely stated the Director-General's intention, subject to certain factors.

The Organisation, contending that the non-renewal of contract was not illegal, submits that the complainant has suffered no moral or material injury.

D. In his rejoinder the complainant argues that the OPCW has failed to rebut his contention that the impugned decision was based on false conclusions drawn from the dossier. It did not establish that the 1994 job description reflected the complainant's tasks nor did it prove that he did not meet the requirements of the "alleged new post". It has also failed to demonstrate any substantial differences between the two posts. Therefore, the Director-General's decision constitutes a misuse of authority. The complainant provides examples of projects he has been involved in to prove that he is, indeed, "pro-active" and "innovative".

He presses his arguments that there were indeed breaches of his legitimate expectations and the principle of good faith.

E. In the letter the OPCW submitted in lieu of a surrejoinder it contends that the examples of projects given by the complainant in his rejoinder proves only that he has been involved with certain projects in the Organisation, but not that the initiative for implementing changes has come from him; he has failed to discharge the burden of proof. It denies that the complainant had any legitimate expectations of contract renewal: the OPCW is a "non-career organisation" and fixed-term contracts carry no expectation of renewal.

CONSIDERATIONS

1. At the material time the complainant was the Head of the Budget and Finance Branch in the OPCW, under a three-year fixed-term contract. By a letter of 6 October 1999 the Director-General notified the complainant that his contract would not be renewed, not for reasons related to his past performance but because different skills and experience would be required for the post in the future. The Director-General said he planned to expand the scope and responsibilities of the position of the Head of the Budget and Finance Branch and to re-advertise the post. In a letter of 18 November the complainant requested the Director-General to reconsider this decision and to grant him an extension for at least one year to give him a chance to prove himself. But the Director-General rejected his request.

2. The complainant appealed against the decision not to renew his contract. The Appeals Council recommended that the decision be maintained and by a letter of 23 May 2000 the Director-General reconfirmed his decision.

3. The complainant impugns that decision. He does not dispute that a decision not to renew a contract is a discretionary one, but he contends that false conclusions have been drawn from the dossier and that the decision was taken in breach of his legitimate expectations and of the principle of good faith.

4. He refers to a request for classification action submitted in February 1998 in which a new assessment of his functions was made, showing changes which either were not included in the 1994 job description or had not the same importance at that time. His post was not reclassified.

5. He also refers to an information circular dated 23 April 1998 in which the Director-General said it was his intention to extend "initial three-year appointments for an additional period of two years, provided that the staff member concerned has fully demonstrated that he or she meets the high standards of efficiency, competence and integrity required by the Convention [on the Prohibition of Chemical Weapons]". Staff members' compliance with these standards would be determined on the basis of performance appraisals in accordance with the Organisation's performance appraisal system.

6. The complainant contends that the Director-General mistakenly concluded from the dossier that the post was new and that he was not competent to meet the new requirements: the post advertised was not a new one. The 1994 job description did not reflect his real tasks. The real functions of his post were described in the classification request submitted in February 1998. He considers that there are no substantial differences between his post as set out in that request, the duties and responsibilities he actually performed, and the post which was later advertised.

7. He explains that the experience required for the new post, thirteen years, is not a substantial difference since his supervisor said in 1998 that his post required fifteen years experience. The 1994 job description required ten years experience. He adds that his post was clearly management oriented, which can be seen from the classification request and his performance appraisal report from October 1997 to October 1998. Furthermore, his post called for performance of budgeting as seen in the classification request. If the post was a new one, then his post should have been abolished thus giving him entitlements. He says that the Director-General failed to give reasons for his belief that the complainant did not possess the necessary skills for the future requirements of the post.

8. The complainant argues that he had a legitimate expectation of renewal because in the circular of April 1998 the Director-General stated his intention to extend initial three-year appointments for two years and that compliance with the required standards would be based on performance appraisals. There is no contesting that the complainant's performance appraisal was very good. He sees the failure to follow the information circular as a breach of good faith.

9. He seeks the quashing of the Director-General's decision, and two years gross salary plus allowances, moral damages and costs.

10. The Organisation replies that the Director-General had the discretionary authority to consider someone with a different combination of skills for the new post. The complainant was free to apply and demonstrate to the interviewing panel that he was the best candidate for the post. He did not do so.

11. It argues that the decision not to renew an appointment is discretionary, and can only be challenged in circumstances defined by the case law. None of these circumstances applies and the complainant has not shown that there was any abuse of authority. The Director-General was not required to take into account the complainant's performance appraisal since the case was a clear case of non-renewal of a contract coming to its natural end. The Director-General decided, in the overall interests of the

Organisation, not to renew the contract, to redefine the post with different skills and experience requirements, and to re-advertise it. In those circumstances, a consideration of the complainant's performance appraisal was not relevant.

12. The OPCW states further that, as Interim Staff Rule 4.4.01 provides that a fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment, expectancy does not arise where a post is being abolished. The information circular was a general statement of intent and cannot be construed as a promise made to every staff member. The decision not to renew the complainant's contract was not in breach of good faith.

13. Article VIII, paragraph 44, of the Chemical Weapons Convention gives responsibility to the Director-General for the appointment of the staff, as well as the organisation and functioning of the Technical Secretariat, and states more particularly:

"The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity."

14. The Director-General, in exercise of his discretionary authority and taking into account the overall interests of the Organisation, decided that the post of the Head of the Budget and Finance Branch should be redefined and that the complainant's contract should not be renewed.

15. The Tribunal accepts that the Organisation was entitled to adapt to changes and to modify the job description for the given post in view of the Organisation's future needs. In such circumstances, the consideration of the complainant's performance appraisal was not necessary.

16. The Tribunal notes that Interim Staff Rule 4.4.02(b) provides that separation as a result of the expiration of an appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Interim Staff Rules.

In addition, Rule 9.1.01(b) defines termination within the meaning of the Staff Regulations and Interim Staff Rules as any separation initiated by the Director-General, other than the expiration of a contract.

Therefore, the question of any termination indemnity payable to the complainant does not arise.

17. In support of his argument that the new post is no different from his own, the complainant contends that his post was clearly management oriented and also called for performance of budgeting. However, this involves an appraisal of the needs of the Organisation, which is the prerogative of the Director-General. It is within his discretionary authority to take decisions accordingly. The complainant has not proved that there was any flaw in the decision.

18. The information circular of April 1998 did not amount to a promise on which the complainant could rely. It was a statement of intent but could not be construed as applying to all posts. In the case where the complainant's post was redefined there could be no legitimate expectation that the complainant would be appointed to the new post. The extent of the new duties and responsibilities in the post required re-advertising it. The complainant was free to apply and demonstrate that he was the best candidate for the new post. He failed to do so.

19. Since there was no promise involved, there was no breach of good faith.

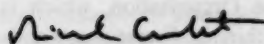
20. The conclusion is that his main claims must fail, and so must his claim to damages.

DECISION

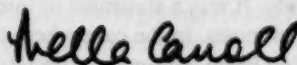
For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

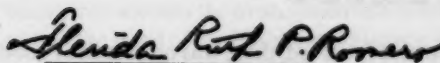
Delivered in public in Geneva on 30 January 2002.



MICHEL GENTOT

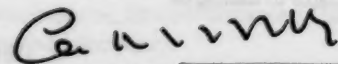


MELLA CARROLL



FLORIDA RUTH P. ROMERO





CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Flösser (No. 6) and Serrano

Judgment No. 2081

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Hans Flösser and the complaint filed by Mr Luis Serrano against the European Molecular Biology Laboratory (EMBL) on 9 August 2000 and corrected on 3 November 2000, the EMBL's reply of 9 February 2001, which was corrected on 21 February, the complainants' rejoinder of 21 May and the Laboratory's surrejoinder of 28 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Many of the facts relevant to the present case are set out in Judgment 2057 (*in re* Argos No. 4 and others), delivered on 12 July 2001.

Since 1 January 1982 the EMBL has been using the system of the Coordinated Organizations* as a standard of reference for the

* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

adjustment of staff pay. Deeming that it was not bound by the decisions of the Coordinated Organizations or by the recommendations of their Coordinating Committee on Remuneration (hereinafter "Coordinating Committee"), the Council of the Laboratory adopted a resolution on 28 June 1995 rejecting the recommendations made in the Coordinating Committee's 40th report and approving, as from 1 July 1995 only, those contained in the 45th report but without applying the proposed downward adjustments. In Judgment 1682 (*in re Argos and others*) of 29 January 1998, the Tribunal quashed the Director-General's decisions rejecting the internal appeals which ten staff members, supported by one hundred and sixty-nine others, had filed against a memorandum notifying to them the Council's decisions. Following that judgment, the Council decided on 2 July 1998 not to alter the previously determined adjustments of their pay for 1995. However, in Judgment 1887 (*in re Argos No. 3 and others*) of 8 July 1999, ruling on an application for execution, the Tribunal sent the cases back to the EMBL and invited it to take the decisions set out in the judgment under 12, which provided *inter alia* that:

"The Laboratory must therefore apply the decisions for the period in question. The evidence shows that the Council's Resolution of 2 July 1998 does not satisfactorily execute Judgment 1682; the individual measures taken in application thereof must be rescinded."

In an address to Laboratory staff in Heidelberg, Germany, on 8 October 1999 the Director-General explained the situation and stated his position. On 24 November 1999, the Council adopted a resolution in which it agreed, in principle, to fund salary adjustments as recommended in the Coordinating Committee's 40th and 45th reports, with effect from 1 July 1995.

Then, on 21 March 2000, it adopted a resolution on the execution of Judgment 1887, in which it decided to apply retroactively, for the period from 1 July 1995 to 30 June 1996, the adjustments recommended by the Coordinating Committee in its 40th and 45th reports, plus interest on arrears at the rate of 10 per cent a year as required by Judgment 1682. The following table was included in the resolution:

	40th Report	45th Report	EMBL [adjustment] 1995	Adjustment due
France	1.9 %	- 0.2 %	0.0 %	1.7 %
Germany	2.1 %	0.3 %	0.3 %	2.1 %
United Kingdom	3.5 %	- 0.1 %	0.0 %	3.4 %

In a written statement of 29 March notifying the Council's decision to all staff, the Director-General explained that the text of Judgment 1887 could give rise to significantly different interpretations. Two questions arose.

(a) First, should 1995 salaries be adjusted applying the indices recommended by the Coordinating Committee for that year (the option known as "salary adjustment"), or should they be increased to the level of salaries established by the Coordinated Organizations for 1995, which includes 1992-1994 increases not previously implemented in full by the EMBL (the option known as "salary level")? The Director-General observed that the Council was prepared to finance the first option, but that if the second option were adopted, the Laboratory itself would have to find the necessary resources. In the end, the Council chose the "salary adjustment" option.

(b) Secondly, should the increase in 1995 salaries be taken into account in determining the salaries for subsequent years (the so-called "consolidated" option), or should it be applied to 1995 only (the so-called "one-off" option)? The Director-General indicated that the "consolidated" option had been discussed in November 1999, but that in Judgments 1912 (*in re Berthet* No. 2 and others) and 1913 (*in re Dauvergne* and others), delivered on 3 February 2000, the Tribunal had dismissed the complaints filed by staff members of the Laboratory challenging their pay slips for 1996 and 1997, and had stated that it had "no reason to conclude that the salary levels decided upon for the [years 1996 and 1997] jeopardise the basic conditions of employment to the preservation of which the

complainants are entitled". The Council took those judgments into account and decided that the adjustment for 1995 would be applied only to that year and would not affect the level of remuneration in subsequent years. The Director-General emphasised that the Council's decision had been taken with the sole objective of executing the previous judgments on the "correct legal basis".

On 12 May 2000 the complainants filed internal appeals with the Director-General against their pay slips for April 2000, the first individual applications of the Council's resolution. By letters of 17 May 2000, which are the impugned decisions, the Director-General rejected their appeals but granted them leave to go directly to the Tribunal.

B. As a preliminary remark, the complainants indicate that they endorse the Staff Association's decision, based on the wishes of the majority of staff, not to challenge the salary adjustment rate granted by the Council for 1995 (2.1 per cent in Germany). Furthermore, in the interests of the Laboratory's future and of their colleagues who are most under threat, they are not claiming everything to which they would be legally entitled.

The complainants have two pleas: an error of law and breach of the principle of good faith.

With regard to the former, they contend that Judgment 1682, as confirmed by Judgment 1887, requires the Laboratory to take into account the retroactive adjustment granted for 1995 to correct the salary levels for subsequent years to which adjustments were applied. They submit that in his written statement of 29 March 2000 the Director-General affirmed that this had been the EMBL's position in November 1999 and that it had changed only in the light of the construction put on Judgments 1912 and 1913 by the Council's legal advisers. Since there is nothing "obscure or wanting" about the decisions given in those judgments, the Laboratory is in breach of *res judicata*. Besides, the Laboratory's argument is devoid of merit because the earlier and the later judgments do not concern the same rules. Judgments 1912 and 1913 relate to the lawfulness of a new system of adjustment introduced on 4 July 1996, while the two earlier judgments address the application of the rules in force before that date.

Their second plea is breach of good faith. The Laboratory's attitude amounts to disregard, on the one hand, for incontrovertible rules by which it is bound and the general principles on salaries set in the case law, and, on the other, *res judicata*. The decision of 21 March 2000 also reflects bad faith in that the Laboratory's justification of it varied: it first cited financial and budgetary considerations and then later, legal grounds.

The complainants ask the Tribunal to quash the impugned decisions; to order the Laboratory to take into account the adjustment granted for 1995 so as to raise the salary levels for subsequent years "proportionately"; to grant interest on arrears at the rate of 8 per cent a year as from 1 July 1996. They claim costs.

C. In its reply the Laboratory denies that its position on the application of Judgments 1682 and 1887 has changed since November 1999. It contends that "it was never the Council's intention to apply Judgment 1887 on the basis of the 'salary levels' of the Coordinated Organizations rather than on annual adjustment indexes".

According to the EMBL, the issue is not one of *res judicata*, and the Laboratory does not deny that the Tribunal's rulings are binding. Indeed, it complied with them fully in applying the recommendations contained in the Coordinating Committee's 40th and 45th reports, and in so doing it can hardly be taxed with breaking rules or acting in bad faith. The nub of the case is whether the Laboratory is bound to extend the salary adjustment for 1995 to the following years. It concludes that no such obligation may be inferred from Judgments 1682 and 1887. Indeed, the Tribunal found in the latter that the Laboratory had to "apply the decisions for the period in question". In other words the obligations arising out of those judgments were limited to the year 1995. That also bears out the Tribunal's ruling in Judgment 1329 (*in re Ball and Borghini*) that the decision taken at each yearly adjustment, though based on the pay scales adopted in previous years, fully supersedes earlier decisions. Moreover, Judgments 1912 and 1913 confirmed that the remuneration levels for 1996 and 1997 were lawful. Lastly, to contest the salary levels for the years after 1995 would be to destroy the balance that it has been at pains to create taking account

of all grades and duty stations and conducting a comparison with salaries in the Coordinated Organizations.

D. In their rejoinder the complainants submit that in Judgments 1912 and 1913 the Tribunal ruled not on salary levels but on the adjustment rates for 1996 and 1997 so it did not reverse its decisions on the adjustment due for 1995. They argue that if each of the salary scales for the various duty stations is raised by the same percentage, the balance referred to by the EMBL will not be affected. They note that the Laboratory is now citing practical reasons for its decision, whereas it had always maintained that it was taken on legal grounds. They accuse the EMBL of banking on the staff tiring and losing their resolve.

E. In its surrejoinder dated 28 August 2001, the EMBL is highly critical of Judgment 2057, delivered on 12 July, in which the Tribunal found partly in the complainants' favour and in particular, under 11, that:

"the Laboratory was bound to give all due effects to a decision it had itself taken to change the salary scales for 1995. Accordingly, and notwithstanding Judgments 1912 and 1913, the complainants are right to claim that the adjustments granted for the period up to 30 June 1996 by the resolution of 21 March 2000 should be maintained beyond that period, and that subsequent adjustments of their pay should be recalculated as from 1 July 1996 on the basis of the amended salary scales that should have been in force at that date in view of the adjustments introduced by the above resolution."

The Laboratory requests the Tribunal to reconsider this judgment in the context of the present complaint.

It submits that neither in national law nor in international civil service law is there any general principle or customary rule under which decisions on remuneration have to be considered as a series of consecutive decisions, each based on the previous salary level. The Council's decisions on salary adjustments for 1996 and 1997 were in line with a new pay policy based on modified adjustment rules and in effect established a new remuneration system. Finally, it submits that it may now reconsider its decisions on salary adjustments after 1995, and it asks the Tribunal to indicate clearly that Judgment 2057 "cannot be understood as implying the obligation to add the percentage increase for 1995 to subsequent salary adjustments".

CONSIDERATIONS

1. The staff and the EMBL have been embroiled in a dispute concerning salary adjustments, as related in Judgments 1682, 1887, 1912, 1913 and 2057.

In Judgment 1682, the Tribunal dismissed the claims concerning decisions prior to 1995 but allowed those concerning the refusal to adjust salaries in 1995. It sent the case back for the EMBL to examine the rights of the staff concerned in respect of the adjustment of their remuneration in 1995. Judgment 1887 concerned the execution of Judgment 1682.

However, in Judgments 1912 and 1913, delivered before the adjustment rates for 1995 had been recalculated, ruling on the EMBL's decisions on the salary adjustments for 1996 and 1997 the Tribunal found that the adjustment rates had been determined in accordance with the applicable provisions and dismissed the complaints.

In a resolution adopted on 21 March 2000, the Council of the Laboratory decided to apply retroactively for 1995 the adjustments recommended by the Coordinating Committee. In a written statement of 29 March, the Director-General informed staff that the Council had decided *inter alia* that the adjustment for 1995 would apply only to that year and would not affect the level of remuneration for subsequent years. Some staff members challenged the first individual application to them of the Council's resolution, arguing that the adjustment granted for 1995 should have been taken into account in determining the salary scales in subsequent years.

In Judgment 2057, the Tribunal allowed the complaints in part and invited the Laboratory to recalculate the remuneration for 1996 and 1997 taking into account the adjustment granted for 1995.

In the present case the complainants appealed to the Director-General against their pay slips for April 2000, the first individual applications of the Council's resolution. In their view the adjustment granted for 1995 should have been taken into account in determining the salary scales for subsequent years. By letters of 17 May 2000, the impugned decisions, the Director-General dismissed their internal appeals and allowed them to come directly to the Tribunal.

2. In their submission the complainants ask the Tribunal to quash the impugned decisions and to order the Laboratory to take into account the 1995 adjustment and to raise the salary levels for the following years proportionately, with interest on arrears payable at 8 per cent a year as from 1 July 1996.

The Laboratory calls for the complaints to be dismissed on the ground that Judgments 1682 and 1887 concerned only the determination of remuneration for 1995, and that remuneration for 1996 and 1997 was set definitively in Judgments 1912 and 1913.

3. The present case has the same purpose as the complaint which gave rise to Judgment 2057. The latter does not carry the authority of *res judicata* in the present case, however, because the complainants are different and a judgment applies only to the parties to the dispute. The Tribunal is therefore not legally bound by *res judicata* here. Besides, the pleadings in this case are not quite the same.

The Laboratory criticises Judgment 2057, asserting that it is not in accordance with the law. It asks the Tribunal to reverse precedent, but has not filed an application for review. The Tribunal will examine below whether the Laboratory's objections are well-founded.

4. The complainants refer to their complaints as applications for the execution of Judgments 1682 and 1887. They claim that the above judgments concerned the adjustment of salaries for 1995 and that the resulting remuneration level should have served as a basis for subsequent adjustments.

But their complaints do not pass muster as applications for execution.

(a) In principle, only the parties to a judgment may avail themselves of it to apply for its execution.

In the present case, Mr Flösser was a party to both Judgment 1682 and Judgment 1887, whereas Mr Serrano was not. The latter, therefore, does not have *locus standi* to benefit from the execution of these judgments (see Judgment 1978, *in re Bousquet* No. 3 and others, under 4(a), and Judgment 1980, *in re Cervantes* No. 6 and others, under 5).

(b) Furthermore, the authority of *res judicata* applies only to issues addressed in a previous judgment (see Judgment 1978, under 4).

Judgment 1682 addressed only remuneration for 1995. It said nothing about the amount to be taken into account in any adjustment of pay for subsequent years.

As an application for execution, the complaint is therefore devoid of merit, as the Laboratory rightly argues.

(c) The complaint must, however, be examined in accordance with its real legal nature.

The complainants are in fact relying on the following rule, which is recognised by international organisations and the Tribunal and is based on the principle of the stability of administrative decisions: a decision determining salaries must be challenged immediately, if this is not done, it will serve as a basis for subsequent adjustments. The same applies if it is challenged but upheld; if the challenge succeeds, however, it is the final decision which will serve as the basis thereafter. Furthermore, unless there is a valid reason for proceeding otherwise, the adjustment will be applied to the most recent pay scales (see Judgments 1329, under 9, 1682, under 3, and 2057, under 8). The complainants say that the salary levels resulting from Judgment 1682 should be used for adjustments for subsequent years, with each adjustment taking as a basis the salary scales for the previous year. The Council's decision of 21 March 2000 is in breach of these principles.

In rebuttal, the Laboratory argues that the salary levels for 1996 and 1997 were determined definitively by the Laboratory and approved by the Tribunal in Judgments 1912 and 1913, so the issue has been resolved once and for all.

The conclusion is that the purpose of the complaint is not the execution of Judgments 1682 and 1887.

It must therefore be entertained as an ordinary complaint against a decision taken by the Laboratory.

(d) There is nothing to prevent it being treated as such. The parties have amply covered all the issues. Moreover, the Laboratory waived the

obligation to exhaust the internal means of redress. In these circumstances, it would be sheer pedantry to send the case back.

5. Since the Laboratory's intention was to allow all staff to benefit from Judgments 1682 and 1887, Mr Serrano has every right to demand their execution. There is therefore no doubt about his *locus standi*, and indeed the defendant does not challenge it.

6. The Laboratory argues that since Judgments 1912 and 1913 carry the authority of *res judicata*, the level of salaries for 1996 and 1997 has been set once and for all.

However, they carry the authority of *res judicata* only in respect of the issues raised in them.

Analysis of Judgments 1912 and 1913 shows that it was the lawfulness of the rates of adjustment which was at issue, not the basic level of pay to which the rates would apply. The Tribunal's finding that the salary levels yielded by the adjustment did not impair their rights suggested that staff sustained no unlawful injury in this respect. But the Tribunal gave no ruling on the level of pay which was to serve as a basis for applying the adjustment, because that issue had not been raised before it. At the time the exact level of salaries for 1995 had not yet been set and a new decision by the Laboratory on the matter was awaited, following Judgments 1682 and 1887.

On this point, the Tribunal cannot depart from what it said in Judgment 2057, under 8 to 11.

The conclusion is that in Judgments 1912 and 1913 there was no ruling on the salary scales which were to serve as a basis for the adjustments, so the question of *res judicata* does not arise.

7. The issue to be resolved therefore is whether the complainants are barred from objecting to the EMBL's failure to take into account the corrected level of salaries for 1995 in determining the salaries for 1996 and 1997, because they did not first challenge their salaries for 1996 and 1997 (see above under 4(c)) when they were originally fixed.

But in view of the circumstances, to make such a demand on them would be pedantic and wanting in good faith. As the parties were aware, at the time the salary levels for 1995 were under challenge and the principle upon which the challenge was based had been upheld by the Tribunal. Moreover, any change in salary levels will ordinarily affect pay in subsequent years. The staff therefore had good reason to believe that a change in pay for 1995 would have a "knock on" effect on the level of salaries used as a basis for calculating pay in the future. Moreover, the Laboratory could be in no doubt that this was what staff would expect. In these circumstances, and having given them no indication to the contrary, the Laboratory could not require staff to challenge each new determination of their salaries on the conditional and hypothetical basis that any successful challenge to the remuneration for a previous year (in this case 1995) should automatically be carried through to the salary levels taken into account in subsequent years. What is more, in his written statement of 29 March 2000, the Director-General mentioned that the so-called "consolidated" option had been envisaged, but that the Laboratory had abandoned it following the delivery of Judgments 1912 and 1913 (see A above).

It was therefore accepted by implication that the issue of the salary levels to be taken as a basis for the 1996 and 1997 adjustments could be reviewed after a decision was handed down on the salary adjustment for 1995.

The complainants were therefore not barred from demanding to benefit from the knock on effect at the first individual application to them of the Council's resolution of 21 March 2000.

The Tribunal based its ruling in Judgment 2057 on this consideration, and is bound to confirm it in the present case.

8. Consistent precedent has it that an organisation is ordinarily free to determine the pay of its staff, provided that it respects certain requirements arising from general principles of international civil service law (see Judgments 1912, under 13, and 1913, under 11). Furthermore, if the organisation has a rule granting certain rights to staff members in relation to their level of salary, it may not depart from that rule in

individual decisions without amending it in accordance with the prescribed procedure.

That is why in Judgment 1682 the Tribunal invited the Laboratory to set pay scales for 1995 in accordance with the rule which makes reference to the decisions of the Coordinated Organizations on salary adjustments.

Until 1996, Article R 4 1.01 of the Staff Regulations stated:

"When reviewing remuneration, the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decisions taken by Council as laid down in Annex R.A.1."

On 4 July 1996 the Council amended this provision, which has since read as follows:

"Basic salary scales and allowances shall be reviewed and determined in accordance with the decisions taken by Council as laid down in Annex R.A.1."

As for Annex R.A.1, it now reads in part:

"The Council,

- stressing the need for maintaining its sovereign power of decision on remuneration policy of the organisation which excludes an automatic application of any particular method of adjusting pay;
- stating that the reference to the relevant decisions of the Coordinated Organisations in accordance with the decision taken by Council on December 9, 1981 has never constituted a legal obligation to apply such decisions in full or at all;
- herewith replacing its decision of December 9, 1981, decides that:
 1. When reviewing basic salary scales and allowances for staff based in Germany, the Council shall use as an orientation the index calculated according to the procedure of the Coordinated Organisations with respect to adjustment of the basic salary scales of the Coordinated Organisations in Germany.
 2. When assessing whether or to what extent this index shall be applied as the actual salary adjustment, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organisation and in Member States.
 3. The basic salary scales and the allowances for staff based outside Germany will be determined so as to preserve purchasing power parities calculated according to the procedure of the Coordinated Organisations.
 4. The basic salary scales and the allowances for staff shall require the approval of a formal Council resolution."

Moreover, in Judgments 1912 and 1913 the Tribunal recalled that:

"The principles governing the limits on the discretion of international organisations to set adjustments in staff pay have been well established in a number of judgments. Those principles may be concisely stated as follows:

- (a) An international organisation is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff provided that it meets all other principles of international civil service law: Judgment 1682 (*in re Argos and others*) in 6.
- (b) The chosen methodology must ensure that the results are 'stable, foreseeable and clearly understood': Judgments 1265 (*in re Berlioz and others*) in 27 and 1419 (*in re Meylan and others*) in 30.
- (c) Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons for such departure: Judgment 1682, again in 6.
- (d) While the necessity of saving money may be one valid factor to be considered in adjusting salaries provided the method adopted is objective, stable and foreseeable (Judgment 1329 (*in re Ball and Borghini*) in 21), the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference: Judgments 1682 in 7 and 990 (*in re Cuvillier No. 3*) in 6."

The texts adopted in 1996 show that the Laboratory intended to introduce a measure of flexibility in its linkage to the Coordinated Organizations with regard to the rate of adjustment. However, these make no allusion to any possibility of the Laboratory not basing the adjustment on the previously acquired salary level, which is the normal procedure. The new methodology did not modify the procedure and staff could accordingly expect in good faith that the adjustments adopted with reference to the Coordinated Organizations' system, which was supposed to maintain purchasing power, would be based on the previously acquired salary level.

The decision to apply the new methodology did not respect the rule in force as it might reasonably be understood by the staff of the Laboratory.

Nor in the way the Laboratory saw fit to apply it, did the new methodology comply with the requirement of stability, foreseeability and clarity established by the case law. Indeed, the staff could not be expected to foresee that the Laboratory would suddenly stop according them the previously acquired salary level.

There is no comparison between this situation and that of organisations which have completely changed the pay system with a view to achieving a certain level of coherence (see, for example, the case of the European Patent Organisation in Judgment 1663 (*in re Bousquet No. 2 and others*)).

The conclusion is that the Council's resolution of 21 March 2000 does not respect the rights of the staff members. The individual decisions applying the resolution to the complainants must therefore be set aside, as they deny their right to the maintenance of the level of pay previously acquired.

But the Tribunal cannot, as the complainants appear to be requesting, rule on the years following 1996 and 1997 since the present complaint does not challenge any actual decision in that regard.

9. In its surrejoinder the EMBL asserts that if it were to be compelled to review for the two periods in question the level of pay to be taken into account for the application of the adjustment rate, it should also be accorded the possibility to revise the rate, which, it says, has already been determined with a view to ensuring purchasing power parity.

As matters now stand it is not possible to rule in fact and in law on the pertinence of this plea. Suffice it to say, in general terms, that both parties have a duty to act in good faith.

10. Any amounts due shall bear interest at the rate of 8 per cent a year.

The case law shows that the rate of interest on arrears has been reduced from 10 to 8 per cent to take account of developments in the financial markets and the absence of any significant inflation in the States whose currency is decisive for international organisations. In Judgment 1682, ruling on the salary adjustments for 1995, the Tribunal applied an interest rate of 10 per cent. This is specified under 9 in that judgment, which in this respect carries the authority of *res judicata*. Judgment 1887 on the execution of the above judgment could not modify that rate. However, Judgment 2057, which among other matters deals with pay levels for the following years, and which was adopted on 3 May 2001, had to apply the new rate. This change in the case law is not unfavourable to the Laboratory.

Interest on arrears must be calculated from the due date of each payment, and not globally from 1 July 1996, as claimed by the complainants.

11. The conclusion is that the complainant's pleas succeed, as did those of the complainants in the case which gave rise to Judgment 2057.

12. Having succeeded, the complainants are entitled to costs, which are set at 4,000 euros.

DECISION

For the above reasons,

1. The impugned decisions are set aside.
2. The case is sent back to the Laboratory for new decisions in accordance with 8, 9 and 10 above.
3. The Laboratory shall pay the complainants a total of 4,000 euros in costs.
4. Their other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

JAMES K. HUGESSEN

CATHERINE COMTET

NINETY-SECOND SESSION

***In re* Flösser (No. 7), Hassler (No. 2),
Herzog (No. 2), Müller (No. 2),
Schechinger (No. 4), Walter (No. 3),
Wernz (No. 2) and Winkler (No. 2)**

Judgment No. 2082

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr Hans Flösser, the second complaints filed by Mr Norbert Hassler, Mr Hans Herzog and Mr Konrad Müller, the fourth complaint filed by Mr Erich Schechinger, the third complaint filed by Ms Anne Walter, and the second complaints filed by Mr Otto Wernz and Mr Wolfgang Winkler against the European Molecular Biology Laboratory (EMBL) on 4 April 2001, the EMBL's reply of 17 April, the complainants' rejoinder of 23 May, and the Laboratory's surrejoinder of 7 June 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to the present case are set out in Judgment 1986 (*in re* Flösser No. 5 and others) delivered on 12 July 2000 in which the complainants challenged what they characterised as the Director-General's "decision not to make a substantive decision" regarding their requests for the inward transfer of their pension rights accrued under the

German social security pension insurance scheme – administered by the *Bundesversicherungsanstalt für Angestellte** (BfA) – to the EMBL scheme. Although the Tribunal held their complaint to be irreceivable and dismissed it, the Tribunal noted that the Laboratory had conceded that “the complainants [would] have available to them the full right to appeal” when a final decision was reached following review of the matter by the EMBL Council.

On 8 August 2000 the Administrative Director informed the complainants that on 24 November 1999 the EMBL Council had decided to abolish Article 12 of the Pension Scheme Rules applicable to staff of the EMBL, thus making it impossible to accept any inward transfers from other pension schemes after that date. Consequently, their requests for transfer of accrued pension rights were evaluated in the light of Article 12 as it existed when the requests were first made. At the relevant time paragraph 1 of Article 12 read:

“Article 12 - Inward and outward transfer of pension rights

1. A staff member who enters the service of the Organization after leaving the service of a government administration or national organization, or any international organization, or a firm, may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer.

In such a case the Organization shall determine, by reference to his grade on confirmation of appointment and to the Instructions for the implementation of these Rules, the number of years of reckonable service with which he shall be credited under its own pension scheme.”

The Administrative Director further informed the complainants that they did not meet the requirements of Article 12 and that their request to transfer funds from their previous pension scheme had been rejected.

On 24 August the complainants appealed against this decision to the Joint Advisory Appeals Board. In the report of its session held on 14 November 2000, the Board stated that it considered the appeal to contain a legal issue outside its competence and that the dispute should be put before the Administrative Tribunal of the International Labour Organization. In his

*Federal Insurance Office for Salaried Employees

decision of 9 January 2001 the Director-General informed the complainants that he accepted most of the findings in the Board's report, that he was upholding the Administrative Director's decision of 8 August 2000, and that the complainants could appeal to the Tribunal. That is the impugned decision.

B. The complainants argue that the question in law to be decided by the Tribunal is whether Article 12 of the EMBL Pension Scheme Rules, in force when they first sought its application, permits their request for the inward transfer of their previously accrued pension rights. They point out that at the time each joined the EMBL there were no Instructions for the implementation of Article 12, nor were there any provisions for the outward transfer of pension rights within the BfA scheme. It was not until 1994 that provisions for outward transfer of pension rights were made in the BfA scheme but the EMBL still had not drawn up any Instructions for the implementation of Article 12. To their knowledge, the Instructions have never been drawn up, despite the fact that the Director-General was required to do so under Article 43 of the Pension Scheme Rules.

They submit that a literal reading of the text of Article 12, in all three official languages, shows no express time limit, and that under general principles of administrative labour law an employer may not invoke a time limit which is "not foreseen in a clear text". Furthermore, they contend that in cases of doubt, a text drafted by the employer must be interpreted in favour of the employee. They consider that if the EMBL had intended to place a time limit on the inward transfer of pension rights then it should have drafted a text similar to that in the pension rules of the European Organisation for the Safety of Air Navigation (Eurocontrol Agency), which limits transfers by the wording "on becoming established with the Agency". They also claim that there is "a problem of discrimination and equality of treatment" because outward transfers have been allowed under Article 12, whereas inward transfers have been refused.

They request the Tribunal to order the Laboratory: to draw up the necessary Instructions for implementing former Article 12 of the Pension Scheme Rules; to enter into an agreement with the BfA that it is "necessary and sufficient" to transfer the amounts corresponding to each complainant's

accrued pension rights; to advise and inform each complainant of the exact consequences of such a transfer and to make each transfer subject to the sole condition of the respective complainant's agreement; and to award each complainant an equitable indemnity for legal fees and costs.

C. In its reply the Laboratory submits that the absence of Instructions for the implementation of Article 12 would have presented no bar for an inward transfer of pension rights if such a request had been made by the complainants when the EMBL's own pension scheme was created or upon entering into the Laboratory's service. As the Laboratory interprets Article 12, in all three languages, the request for an inward transfer must be made "at the point of entry to the service of the Laboratory". It disagrees that there is a problem of discrimination: outward transfers have been allowed where they comply with Article 12, but there have been no cases of inward transfers complying with that article. It is not relevant to provide the rules in force at other organisations, as those rules are not binding on the Laboratory.

It presses the arguments it made on the merits in the case leading to Judgment 1986.

D. In their rejoinder the complainants submit that the Laboratory has missed the point as to why they have referred to the rules of other organisations. They agree that it is only the EMBL's Article 12 that applies in this case. They have cited the rules of other organisations simply to prove that it was not impossible to add clear text regarding a time limit, but that the EMBL did not do so in drafting its Article 12, nor has it explained why it did not.

They argue that the EMBL never intended to include a time limit in Article 12. Had it intended to do so, it would have needed to introduce transitional measures for employees already at the Laboratory prior to 1978, the year its own pension scheme was created. However, no such provisional measures were introduced. Lastly, they ask the Tribunal to set a time limit for the execution of this judgment, stating that the EMBL has never shown diligence in this matter and that they have had to wait many years for a substantive decision.

E. In its surrejoinder the EMBL states that it does not need to explain why its Article 12 is not identical to that of other organisations. It has already demonstrated that this provision establishes "clear, sequential and logical time limits" that were not met by the complainants. The complainants arguments have done nothing to refute this fact. Staff members already employed by the Laboratory prior to the creation of its pension scheme could have requested inward transfers of accrued pension rights if their previous employer's scheme allowed for such requests; no such requests were received. The EMBL submits that the accusation that the Laboratory has lacked diligence is incorrect and refuted by Judgment 1986.

CONSIDERATIONS

1. This case is the sequel to Judgment 1986 in which the Tribunal dismissed as irreceivable the complainants' complaint on the ground that the decision then impugned was not materially different from earlier decisions, to the same effect, which had not been timely appealed to the Tribunal. All of those decisions had been to defer any decision on the merits of the complainants' requests regarding the possible transfer of their accrued pension rights under the BfA scheme into the Laboratory's own pension scheme. In this judgment the Tribunal noted that the Laboratory had indicated that the complainants would enjoy the right of appeal when a final decision had been taken.

2. The complainants are all present or former staff members of the EMBL who joined the Laboratory at various dates between 1975 and 1982. Prior to joining the EMBL, they had all contributed to the BfA scheme.

3. In 1978, the EMBL established its own pension scheme. The pertinent provisions of the Pension Scheme Rules relating to that plan are contained in Articles 12 and 43. Article 12 is reproduced under A above. Article 43 reads as follows:

"Article 43 - Detailed implementation

Instructions for the implementation of these Rules shall be drawn up by the Director-General.

..."

4. Prior to 1995 the BfA scheme had no provision for outward transfers so that the complainants were obliged to leave their previous contributions in that scheme and could not transfer them into the EMBL pension scheme. With the change of German legislation outward transfers from the BfA scheme became possible. In November 1997 the complainants applied to the Director-General for information as to the formalities required for such transfers; they also asked him what the practical results of these would be. It was the Laboratory's failure to deal with the merits of those requests which ultimately gave rise to Judgment 1986.

5. On 8 August 2000, by a decision later confirmed on appeal to the Director-General and now impugned, the Laboratory refused those requests.

6. The relevant paragraphs of that decision read as follows:

"The first paragraph of Article 12 of [the EMBL Pension Scheme (EMBLPS)] Rules is clear both in content and meaning. To make a transfer into EMBLPS a staff member who enters the service of EMBL may arrange payment of amounts accrued under a previous scheme in so far as that scheme allows such a transfer. In such a case the reckonable service in EMBLPS shall be determined by reference to his grade on confirmation of appointment.

It follows that a staff member wishing to transfer funds into the EMBLPS must on entering EMBL's service (i.e. on joining EMBL) have transferable funds from a previous scheme, may elect in principle to transfer them and will then, on confirmation of appointment (i.e. once probation is completed), have determined by EMBL the reckonable service the funds will purchase. At that point the staff member can finally decide whether to transfer funds or retain pension entitlement in the previous pension scheme. The point of such transfer arrangements is to allow a seamless transition between schemes when changing employer and on receiving a confirmed appointment from the new employer.

Thus for any request to transfer funds into EMBLPS to succeed the individual must on entering EMBL's service have transferable funds from a previous scheme and must elect to transfer them at the time of receiving a confirmed appointment. On entering EMBL's service you had no transferable funds available and at the time your appointment was confirmed could not elect to make a transfer. The fact that many years later in 1995 changes in German legislation opened the possibility of making transfers out of the German pension scheme cannot lay retroactive obligations on EMBL to accept transfers into its pension scheme.

In summary you did not meet the requirements of Article 12 of the EMBLPS Rules, which was the Rule in force at the appropriate time.

Accordingly, I have to decline your request to transfer funds from your previous pension scheme into EMBLPS."

7. It should be noted that the Laboratory has now repealed Article 12 but that such repeal did not take effect until well after the complainants had made their requests for transfer.

8. Furthermore, despite the apparently mandatory wording of Article 43, the Director-General has never drawn-up the implementing Instructions envisaged by that text.

9. One looks in vain in the text of Article 12 for any words of temporal limitation governing the exercise of the right, which that provision confers on an employee, to request the transfer of his rights under a previous pension scheme. The text does not state, as some similar rules do, that the rights must be exercised at the time the employee becomes established (see for example Judgment 473 *in re Haas*). Nor does it set a specific period of time for making the necessary request (see for example Article 12 of the Pension Scheme Rules of the Coordinated Organizations.)

10. It is trite law to state that time limits cannot be presumed but must be either expressly stated or so clearly implied from the context as to leave no room for doubt. In the impugned decision, the EMBL appears to infer two such limits: first, that the right to transfer must exist at the time the employee joins the Laboratory; and second, that the right must be exercised at the time the employee is confirmed in his appointment i.e. upon the expiry of probation. Neither inference is permissible.

11. The first sentence of Article 12 is perfectly neutral as regards time. It does not state that an employee "on entering" the service of the

*They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

Organisation has the stated rights; they are conferred unreservedly upon any employee "who enters" such service. The condition that the previous pension scheme allow such transfer need only be fulfilled at the time the request to transfer is made. It is simply irrelevant to inquire whether or not at some prior time the previous scheme permitted outward transfers.

12. Likewise, the reference to the "grade on confirmation of appointment" in the second paragraph is manifestly for the sole purpose of allowing the Laboratory to determine the consequences of the inward transfer and does not create a condition precedent to the making of it. Once the request for inward transfer is made the EMBL "shall" determine, by reference to the two stated criteria, the number of years of reckonable service to be credited to the employee under the pension scheme.

13. It has not been suggested that the failure of the Director-General to draw up the Instructions necessary for the establishment of the second reference point can, in any way, defeat the complainants' rights. The failure to meet a condition, whose fulfilment depends entirely upon the Laboratory, results simply in the condition being treated as not having been required. Thus, the consequence of that failure is that the determination must now be made by reference only to each complainant's grade at the date of confirmation of his or her appointment. It is therefore not necessary to give effect to the complainants' request that the Tribunal now order the Director-General to draw up the requisite Instructions; Article 12 having been abolished, it is in any event doubtful that any such Instructions could now be validly drawn up. Since the complainants have been trying unsuccessfully to exercise their rights since 1997, the Tribunal will set time limits within which the parties must act.

14. The impugned decision must be set aside and the Laboratory will be directed to calculate the number of years of reckonable service to be credited to each complainant by reference only to each one's grade at date of confirmation of appointment and to advise each complainant of such amount within ninety days of the delivery of the present judgment, after which each complainant shall have a further ninety days in which to elect

whether or not to proceed with such transfer. The complainants should have their costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the Laboratory is ordered within ninety days of delivery of the present judgment to advise each complainant of the number of years of reckonable service which would be credited to the latter upon the transfer into the EMBL Pension Scheme of the amounts standing to his or her credit in the (BfA) scheme.
2. Each complainant shall then have ninety days in which to advise the Laboratory as to whether or not that complainant wishes to effect such transfer.
3. The EMBL shall pay the complainants' costs in the global amount of 5,000 euros.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Ansermoz

Judgment No. 2083

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Myriam Ansermoz against the International Labour Organization (ILO) on 27 October 2000 and corrected on 23 November 2000, the ILO's reply received on 27 February 2001 and the complainant's letter of 2 April 2001 to the Registrar declining to enter a rejoinder;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss citizen born in 1947, joined the International Labour Office (ILO), the Organization's secretariat, in 1973. She underwent surgery for a detached retina of the right eye in November 1976 and again in August and September 1980. In December 1983 the Compensation Committee unanimously recommended that, since hers was a very special case the Director-General should, by way of an exception, recognise the last two retinal detachments as attributable to the performance of official duties. In 1991 the complainant suffered a detached vitreous in the left eye which the ILO also treated as service incurred. In its report of 8 May 1992 the Invalidity Committee found the complainant

to have an overall incapacity of 34 per cent, and recommended granting her compensation in the corresponding amount. In December 1993 the complainant and the Administration agreed on an amount after lengthy negotiations.

For several years the ILO refunded to the complainant all the medical and other costs generated by these injuries. But as from 28 September 1998 it stopped paying her claims, the Organization's medical officer having doubts as to their coverage by the compensation scheme. Having been consulted, the Compensation Committee found that her medical expenses no longer corresponded to treatment for retinal detachments but for shortsightedness which was unrelated to the service-incurred injuries. The complainant was so informed in a letter of 6 December 1999. On 4 February 2000 she sent in a medical report from her own doctor stating that there was an obvious connection between her treatment and the service-incurred injuries. After correspondence, the ILO informed the complainant by a letter of 26 July 2000 that it upheld its decision of 6 December 1999. That is the impugned decision.

B. The complainant submits that the case turns on whether the ILO should refund 100 per cent of the costs she incurs in attending an eye hospital for a checkup every three months as being a consequence of injuries attributable to the performance of official duties. It is a medical question to which the hospital gave a clear response, which the ILO rejects even though for several years it took the opposite view.

The complainant points out that the decisions to treat her injuries as attributable to the performance of official duties stipulate that she is entitled – under paragraph 7(a) of Annex II to the Staff Regulations (concerning compensation in the event of illness, injury or death attributable to the performance of official duties) – to “the reimbursement of all reasonable medical and related expenses concerning [her] accident”. In her submission the whole point of including that clause was to avoid having to establish a direct causal link between the injuries and the treatments for which she has claimed reimbursement. By rejecting her claims the ILO exceeds the terms of the decisions.

She asks the Tribunal to quash the impugned decision, to invite the Organization to refund to her in full her hospital bills and related expenses, and to reserve her rights for any future medical costs arising from the service-incurred injuries.

C. In its reply the ILO deems irreceivable the complainant's claim to full reimbursement of her hospital bills - including the ones she says she "gave up" submitting after the end of 1998. Her claim to have her rights reserved is also irreceivable, being hypothetical and too vague. Nevertheless once the Tribunal has ruled, the ILO will heed its decision in dealing with any further claims in this connection as well as any indication the Tribunal may give on the scope of its liability.

The Organization says that, in its view, the case turns on the extent to which the ILO's statutory obligation to pay compensation for occupational injury covers the complainant's visits to her ophthalmologist in 1998. The problem is one of interpretation in which expert medical opinion is only one factor and in which the final decision rests with the Director-General.

In its submission, the obligation is not unconditional but ceases once the injury has stabilised. The ILO continued to settle the complainant's claims well beyond stabilisation. The treatments she underwent in 1998 did not constitute curative treatments but rather "periodic checkups". The fact that in the complainant's case it went beyond its statutory obligation can on no account extend the scope of this obligation or prevent the ILO from reverting to strict observance of it. It adds that, as a member of the Organization's health fund, the complainant is entitled to reimbursement of at least 80 per cent of her medical and pharmaceutical costs.

CONSIDERATIONS

1. The complainant joined the International Labour Office on 1 July 1973.

At an initial medical examination carried out on 24 May 1973, after which she was declared fit for service, her visual acuity with contact lenses was found to be 0.6 in the right eye and 1.0 in the left eye.

In November 1976 she suffered a detached retina of the right eye for which she had to undergo surgery. Two further operations for retinal detachments in the right eye followed in 1980. When she resumed work on a full-time basis, at the end of March 1981, she was given duties which involved no exposure to visual display units.

2. In 1982 she claimed compensation for service-incurred injuries on the grounds that her assignment to the Financial Computer Systems and Data Control Section (FINSYS), where her job had involved intensive and prolonged exposure to visual display units, had been partly responsible for the retinal detachments she sustained in 1980.

On 9 December 1983 the Compensation Committee unanimously recommended that "by way of an exception and in view of the very special nature of the case", the Director-General should recognise "the last two retinal detachments [the complainant] sustained while she was at FINSYS as attributable to the performance of her official duties, in accordance with the provisions of Annex II to the Staff Regulations". The Director-General endorsed the recommendation on 13 December 1983 and the complainant was so informed on 20 January 1984.

After lengthy negotiations which culminated in an agreement in 1993, the complainant received the compensation.

Meanwhile, in 1991 she had suffered a detachment of the vitreous of her left eye, recognised in 1992 as service incurred.

3. In accordance with Annex II to the Staff Regulations, the Organization regularly reimbursed her bills relating to the service-incurred injuries.

But it stopped as from September 1998. In a letter of 6 December 1999 the Compensation Committee informed her that her claims would no longer be settled because they were "unrelated to any condition caused by [her] occupational injuries".

Having been asked by the complainant to comment on the ILO's reasons for rejecting her claims, her own doctor replied on 24 January 2000 that she had received "treatment subsequent to a detached retina in

the [right eye] (first occupational injury) ... and to a trauma of the [left eye] (second occupational injury)".

In a letter of 4 February 2000 the complainant made it clear to the ILO that she would take legal action unless some agreement was reached.

After an exchange of letters, on 26 July 2000 the Organization upheld its decision of 6 December 1999 on the grounds that her outstanding claims and the treatment undertaken were "related not to any deterioration of her eye condition as a result of the service-incurred injuries but to periodic checkups and treatment which would have been necessary regardless of [these] injuries because she already suffered from myopia and in the 1970s had sustained a detached retina which was unrelated to her work". That is the decision she is challenging in this complaint.

4. She asks the Tribunal:

- to quash the impugned decision and invite the Organization to refund to her in full the bills for her quarterly checkups which she submitted between September 1998 and September 2000, together with her travel and other related costs, as being reasonable medical and related expenses arising from injuries recognised as service incurred;
- to reserve her rights in respect of any future medical costs arising out of these injuries.

5. The ILO rightly observes that some of her claims are irreceivable.

Her claim to repayment of costs incurred in visiting the eye hospital is irreceivable insofar as it concerns the bills she did not submit after the end of 1998.

So too is the claim to "reserve the complainant's rights in respect of any future medical costs arising from [the] injuries" recognised as service incurred, since it shows no actual and present interest.

6. The complainant is claiming reimbursement of bills for periodic checkups and treatment which, in her view, constitute reasonable medical expenses reimbursable under paragraph 7(a) of Annex II to the Staff Regulations:

"An official who suffers illness or injury which is within the scope of this Annex shall be entitled to the reimbursement of all reasonable medical, surgical, pharmaceutical, hospitalization and convalescence expenses, any travel expenses necessarily incurred in obtaining proper treatment and the reasonable cost of any necessary artificial limbs and surgical appliances and of their normal renewal."

In her view, the nub of the case is whether the ILO must reimburse in full the cost of her quarterly visits to the eye hospital and related expenses as arising out of injuries recognised as service incurred. She contends that the matter is a medical one, as the eye hospital made quite clear, and there need not be a direct causal link between the injuries and the medical treatment. She argues that under the above-mentioned text, the decision to recognise an injury as service incurred entitles her to reimbursement of all reasonable medical and related costs arising from the injury. Since the whole purpose of periodic checkups and treatment is to prevent any deterioration in her eye condition they are obviously related to the service-incurred injuries.

7. The Organization retorts that the issue to be resolved is the extent to which her periodic visits to her eye doctor in 1998 fall within its statutory obligation to compensate occupational injuries. It views the problem as one of interpretation in which expert medical opinion is only one factor, and while the latter may be decisive to settling the issue, the final decision is within the Director-General's discretionary power. Moreover, the treatments undertaken in 1998 and for which the complainant claims reimbursement were not for curative treatment as her medical certificate states, but for "periodic checkups". The latter will not improve her eyesight or restore her capacity for work, which "has been permanently impaired not by eye problems but by ailments of another kind".

The ILO argues that even supposing, as the complainant asserts, that its obligation under paragraph 7(a) did arise from the causal link between the medical treatment and the consequences of the injuries, the nature of the link would still have to be determined. The existence of a link is enough in the complainant's view, whereas the Organization holds that, in addition, the injury would have to be a direct and principal cause of the treatment.

8. The Tribunal observes that the ILO recognised the complainant's retinal detachments in the right eye in 1980 and the detachment of the vitreous in the left eye in 1991 as service incurred, and accordingly reimbursed regularly the hospital bills she submitted under paragraph 7(a). In other words, it treated them as costs which she was bound to incur in securing the treatment she needed as a result of the injuries. Not until September 1998 did the ILO decide to stop reimbursing the bills on grounds which it notified to the complainant on 6 December 1999, namely that curing her retinal detachments was no longer the object of the treatment. However, it did not show that the service-incurred injuries were not a "direct and principal" cause of the treatment.

9. Given the diverging opinions as to the nature of the treatment in question, the Tribunal takes the view that although, as the Organization says, the decision to stop reimbursing the bills was at the discretion of the Director-General, it could not be taken without an independent expert medical opinion obtained through a process which provides all the safeguards of transparency and impartiality. As the ILO itself points out, this medical opinion is one of the factors to be considered in resolving the issue.

10. In reaching the decision of 26 July 2000 the ILO took no account of any expert medical opinion so issued as to ensure complete impartiality and total transparency and thus accord the Tribunal reliable evidence on which to base an objective assessment. The decision must accordingly be set aside and the case sent back to the Organization for referral, within three months of the date of this judgment, for the opinion of a medical board composed and acting in accordance with paragraph 25(a) of Annex II to the Staff Regulations. Within three months of the referral, the medical board shall submit a report indicating whether the complainant's quarterly checkups and the treatment she receives in that context are related to eye lesions she suffered as a result of injuries which the ILO recognised as service incurred.

11. Since her complaint succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 3,000 Swiss francs.

DECISION

For the above reasons,

1. The decision of 26 July 2000 of the Director-General is set aside.
2. The case is sent back to the Organization for referral to a medical board in accordance with 10 above.
3. The complainant's claims to reimbursement of bills which she did not submit and to reservation of her rights for future medical costs are dismissed.
4. The Organization shall pay the complainant 3,000 Swiss francs in costs.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

NINETY-SECOND SESSION

***In re* Ortiz Rodríguez (No. 2)**
(Application for review)

Judgment No. 2084

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1924 filed by Mr José Luis Ortiz Rodríguez on 29 August 2000 and corrected on 15 September 2000, the reply of 1 February 2001 from the United Nations Industrial Development Organization (UNIDO), the complainant's rejoinder of 7 March, and the Organization's surrejoinder of 12 June 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

CONSIDERATIONS

1. In Judgment 1924 the Tribunal ordered that an offer of settlement made by UNIDO, dated 16 October 1998, and accepted by the complainant should be implemented by the Organization. It awarded the complainant 5,000 United States dollars in costs and dismissed all other claims. The judgment has been fully executed.

2. The complainant now contends that he was intimidated by an official of the Organization into accepting the settlement offer of 16 October 1998, an allegation which was not made in the original complaint and which is strenuously denied by the Organization. The complainant submits that this

is a "new fact". He seeks a review of Judgment 1924 and asks the Tribunal to reconsider the pleas contained in his complaint. He also seeks reinstatement, or alternatively, additional compensation together with moral damages and interest.

3. The Tribunal will not review its judgments except in the most unusual circumstances: one of these is the discovery of conclusive new evidence which could not have been brought forward before. Without having to decide on the question of credibility, the allegation of intimidation now made by the complainant does not constitute a "new fact" of which the complainant was unaware when presenting his complaint to the Tribunal. He had a full opportunity to present all aspects of his case.

4. There are no grounds for reviewing Judgment 1924. The judgment is final and binding and the principle of *res judicata* applies.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Fons Fleming

Judgment No. 2085

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Joseph John Fons Fleming against the Organisation for the Prevention of Chemical Weapons (OPCW) on 22 May 2001 and corrected on 5 June, the OPCW's reply of 11 July, the complainant's rejoinder of 10 August, and the Organisation's surrejoinder of 5 September 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Spanish and American national born in 1970, joined the OPCW on 29 June 1997. He was engaged as a communications clerk on a fixed-term appointment at grade GS-4 in the Operations and Planning Branch of the Inspectorate Division. On 14 December 1999 the Head of Staff Administration informed him of a correction to the entry level grade of his post to GS-5, retroactive from his entry on duty with the Organisation.

Shortly after joining the Operations and Planning Branch in 1997, the complainant was asked to perform different duties from those of a communications clerk. These duties were to come under the supervision

of the Mission Planning Coordinators (MPC) and included designing, developing and maintaining several operational databases, as well as producing reports and statistical information for the Organisation.

An organisation-wide classification review of posts began towards the end of 1997. This review was the subject matter of Judgment 1987 (*in re* Dunseth and Mattmann) delivered on 12 July 2000, in which the complainant was an intervenor. A job description with the complainant's revised duties, which was different from the job description of a communications clerk, was completed for that review; it was signed by the complainant, certified by the Head of the Branch, and approved by the Director of the Inspectorate Division. The classification review results were announced by the Director-General on 6 August 1998; the complainant's post was graded GS-5. However, it was not until the results of the review were implemented in mid-2000, following the Tribunal's decision in Judgment 1987, that appeals against the results could be made to the Classification Review Committee. The complainant appealed to the Committee on 25 October, asserting, *inter alia*, that the wrong job description had been used to classify his post.

On 4 December 2000 the Director-General informed the complainant through the Director of the Inspectorate Division that, on the basis of the findings and recommendations of the Classification Review Committee, he was maintaining the complainant's post at grade GS-5. The Committee's report to the Director-General on the complainant's case was dated 31 January 2001. On 1 February the complainant asked the Director-General to review the decision not to upgrade his post, and after having received a copy of the Committee's report on 2 February, the complainant reiterated his request on 6 February. On 1 March the Director-General informed the complainant that he was maintaining his decision. The Director-General confirmed to the complainant on 23 March 2001 that all internal means of redress had been exhausted and the complainant now impugns the Director-General's decision of 1 March.

B. The complainant contests the Director-General's decision to maintain his post at grade GS-5; he submits that this decision is based on a mistake

of fact. He also contests his job title, arguing that the title has a direct relationship with the job classification review and job grade.

Interim Staff Regulation 2.1, in force during the 1998 classification review, stated that the Director-General "shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required". The complainant's post was classified according to the duties and responsibilities of those of a communications clerk. However, he says, at the time of the review his duties and responsibilities had changed and he had submitted a different job description from that of a communications clerk. The classifier failed to notice the differences between the complainant's duties and those of the other communications clerks, which resulted in an incorrect classification of his post.

He appealed against the classification to the Classification Review Committee, on the grounds "that the job description [he] submitted had not been used" to classify his post; he also stated that his supervisors felt that the duties he performed were of a P-2 level. However, the Committee gave no rationale for its recommendation to maintain his post at grade GS-5 in the report submitted to the Director-General on 31 January 2001. It did not produce a rating sheet either, which, according to the complainant, is a necessary element in the classification of a post. Therefore, the Committee merely reviewed the classification done by the original classifier and thus committed an error. The complainant requested access to the job descriptions and rating sheets used in the original classification review, but this was denied by the Human Resources Branch. He explains these documents were to prove that the classification of his post was based on the wrong information.

He asserts that the classification rating sheet did not correctly reflect the duties and responsibilities of his post and he provides his own analysis of what should have been the rating of certain factors. Since his post was not classified on the basis of the correct job description, he submits that his salary and career were damaged.

He requests the Tribunal to order that his post be upgraded to GS-7 retroactive to 1 January 1999, or, if it finds that his duties reflect a "professional level" then he asks that his post be upgraded to P-2. He also

requests that his job title be changed "to properly reflect the database administration duties he is tasked to perform".

C. In its reply the OPCW submits that the Director-General's decision was consistent with the complainant's terms of employment and all applicable regulations, rules and directives. Citing the Tribunal's case law establishing the grounds for judicial review of a discretionary decision, it contends that none of those grounds exists here.

There was no mistake of fact in classifying the complainant's post together with those of other communications clerks who were under the same rubric ("Communications, Logistics and Movement Clerk"). Classification is carried out with reference to an established post: the fact that the complainant and his supervisors agreed that he would undertake new duties does not mean that a new post had been created. Indeed, the request for a new post had been denied and therefore the complainant has always occupied the same post for which he was hired. In any event, had the request for a post at the P-2 level been approved, the complainant would not have had an automatic right to it. A new vacancy notice for all staff members would have been necessary.

The OPCW concedes that changes have been made to the complainant's original job description, but asserts that this represents "a perfectly normal administrative process that is applicable to all posts, and that continues to this day". It is standard recruitment practice that a vacancy notice contain only a summary of the functions of a post followed by a detailed job description when a candidate is appointed. Furthermore, that job description is subject to change in the light of the Organisation's needs. The important question is not whether there were changes made to the complainant's job description, but "whether the changes entailed such a transformation of the functions of the post as to have resulted in a totally different job assignment". This was not the case. The duties assigned to the complainant were an elaboration of the functions contained in the vacancy notice for a communications clerk.

The complainant has not carried his burden of proof. He has alleged that the Classification Review Committee did not support its recommendation, but he has not shown any irregularity in the classification

process itself. The Committee's report to the Director-General was submitted in accordance with the provisions of Administrative Directive AD/ADM/2. His "self-classification" is inadmissible: staff members are not entitled to conduct their own job classifications. The complainant has not demonstrated any flaw on which the Tribunal could base a judicial review of a discretionary decision.

D. In his rejoinder the complainant seeks to refute the defendant's pleas. He points out that not all posts under the rubric "Communications, Logistics and Movement Clerk" were classified together. The posts of movement clerk were classified at the GS-4 level because a different job description had been submitted for those posts, just as different ones had been submitted for the posts of communications clerk and those of logistics clerk. The complainant had likewise submitted a job description for his post, but it was not evaluated by the classifier.

His supervisor stated in the job description submitted for the 1998 classification review that "the duties [the complainant] is [now] tasked to perform ... bear no relationship to the duties he was hired to perform". Not only are his duties different, but so is his supervisor: the communications clerks are under the supervision of the Communications Officer in the Communications unit, whereas he is under the supervision of the Senior Mission Planning Coordinator in the Mission Planning unit.

The Classification Review Committee only provided an argument as to why the post was not at the "professional level". It did not provide an explanation in its report as to why the complainant's post was maintained at GS-5, nor did it justify the classification rating.

E. In its surrejoinder the Organisation contends that the staff regulations and rules do not provide for the classification of job descriptions without reference to posts. The "new post" that the complainant claims to occupy does not exist, but nevertheless his current post was correctly classified based upon the job description reflecting his duties and responsibilities. As for the complainant's criticisms of the Committee's report, the Organisation considers that the report speaks for itself. The Committee gave an account of the various issues examined in reviewing the

complainant's job description, and found no grounds to recommend a change in the original classification of the post. The only post at issue in the classification appeal was the one for which the complainant was originally appointed.

CONSIDERATIONS

1. The complainant was first employed by the Organisation as a communications clerk at grade GS-4 on a fixed-term appointment for three years from 29 June 1997. This was later extended for a further three years from 29 June 2000.

2. A classification review for the whole Organisation began towards the end of 1997. The results of the job classification review were announced on 6 August 1998. The posts of communications clerk were graded GS-5.

3. Following Judgment 1987 (*in re Dunseth and Mattmann*) delivered on 12 July 2000, confirming the authority of the Director-General to reclassify posts, the staff were informed that appeals against the decision of 6 August 1998 could be submitted by the incumbent of the post in writing to the Director-General, who would submit them to the Classification Review Committee. On the basis of the findings and recommendations of that Committee, the Director-General would then take a final decision.

4. On 25 October 2000 the complainant appealed the classification decision of 6 August 1998; he stated that "two highly skilled professionals" had expressed their view to him that the tasks he performed were at least of the P-2 level. The Committee did not recommend a change. On 4 December the Director-General decided not to change the grade of the post. The reasons for the Committee's recommendation were provided in a report sent to the Director-General on 31 January 2001, a copy of which was furnished to the complainant on 2 February. The complainant requested, on 1 and 6 February 2001, an administrative review of the decision not to upgrade his post. The Director-General

decided on 1 March 2001 not to upgrade his post and this is the decision impugned.

5. The complainant requests the Tribunal to order that his post be graded at GS-7 retroactively from 1 January 1999, or alternatively, at the P-2 level. He also claims a change of job title to reflect the database administration duties he is called on to perform.

6. In the course of the classification review the complainant's supervisor recommended the creation of a new post for the complainant, which was refused on 21 October 1998. A request for a change in job title was also refused on 9 August 1999.

7. The complainant argues that during the classification review his post was not classified according to the nature of his duties and responsibilities, using the job description submitted by him, but rather according to the job description submitted by the other five communications clerks. His duties have changed and he no longer performs the tasks assigned to a communications clerk.

8. He acknowledges that the grading of posts is within the discretion of the Director-General and that such a decision can only be reviewed on limited grounds, one of which is a mistake of fact. However, he contends that the Director-General made a mistake of fact because the wrong job description was used in his case.

9. He also contests his job title which, he says, is directly related to the job classification and the job grade. The classifier for the classification review recommended the job title for the posts classified with the same rationale sheet be changed to Operations Assistant (Communications). The complainant's job description had no indication he performed communications-related tasks. The rating awarded to several factors relevant to classification did not relate to his job description. The original classifier failed to note that the duties in his job description were completely different from the duties described in the job description of the other communications clerks. The complainant requested the Committee

to review his classification on the grounds that the job description he submitted had not been used to review his post and that his supervisors took the view that he performed tasks at the P-2 level. He submits that the Committee gave no reasons for its recommendation to keep his post at GS-5 level. The Committee found it justifiable that the classifier used the same worksheet to classify several posts if those posts were found to be at the same level. The complainant does not accept that this should happen where posts with different duties and responsibilities are concerned; they could only be found to be at the same grade once different rating sheets were used to classify them.

10. The Committee's report stated that the Committee applied the Common General Service Job Classification Standard for Geneva to the job description submitted by the complainant and found no grounds to support a change from the GS-5 grade recommended by the original classifier. But the complainant says it gave no explanation how it reached this conclusion. It did not produce a rating sheet itself as it should have. It applied the Job Classification Standard against a worksheet which was not based on the job description submitted by the complainant but on the job description submitted by the other five communications clerks. He complains that he was denied access to the job description and rating sheet used for their posts. His request was rejected on the basis that the job descriptions or rating sheets of other posts were not relevant to his case. He was also informed that the Committee reviewed the classification of posts by the original classifier by, *inter alia*, reapplying the applicable standards to determine whether they found sufficient grounds to support a change of grade. This did not require the Committee to produce a rating sheet.

11. The OPCW states that the post of communications clerk was placed under the rubric "Communications, Logistics and Movement Clerk". The job description for the posts under that rubric were not identical but reflected a certain degree of specialisation by each incumbent.

12. The OPCW maintains that the changes made in the complainant's original job description did not entail a transformation of the functions of the post so as to result in a totally different job assignment, but rather were an elaboration of the principle functions in the vacancy notice and to modify them was within the discretion of the Organisation. It also points out that if a new post had been established at the P-2 level, as requested by the complainant's supervisor, the complainant would not have been automatically entitled to it: it would have had to be advertised and open to application by other staff members.

13. As the Tribunal has consistently held, a grading decision is within the discretionary authority of the Director-General and is reviewable only on limited grounds, one of which is mistake of fact. It is clear that the complainant drew the Committee's attention to his allegation that his post was assessed without reference to the post description submitted by him. It is equally clear that the Committee considered this job description as well as all other documentation submitted by the complainant. The Committee said in its report that it had independently reviewed classification of the post. This included distinguishing Professional from General Service functions and also applying the Common General Service Job Classification Standard for Geneva to the post. It found no grounds sufficient to support a change from the GS-5 grade recommended by the 1998 review.

14. In the impugned decision, dated 1 March 2001, the Director-General states that having reviewed all the information on the matter, including the memoranda from the complainant dated 1 and 6 February 2001, he has decided to maintain his decision not to upgrade the post. Insofar as the complainant alleges that the Director-General did not consider the job description submitted by him, he is clearly wrong. Both the Director-General and the Committee considered it.

Insofar as the complainant appears to argue that the decision should have been based only on the job description submitted by him, he is also

wrong. Taking everything into consideration, the Committee made a reasoned recommendation, which was endorsed by the Director-General, why the post should not be upgraded. The Tribunal accepts the arguments of the Organisation in this regard.

The claim to upgrade his post fails.

15. This claim having failed, his claim to a new title also fails.

16. All other claims are dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* Hendi**

Judgment No. 2086

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Peter Hendi against the International Telecommunication Union (ITU) on 4 April 2001, the ITU's reply of 23 May, the complainant's rejoinder of 29 June and the Union's surrejoinder of 1 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swedish citizen born in 1943, joined the ITU on 16 November 1981 and was in charge of developing, setting up and maintaining a computer system. He was initially given a short-term appointment, which was extended four times, until 2 September 1983. After a further short-term contract from 3 October to 31 December 1983, the ITU gave him a one-year fixed-term appointment as an analyst/programmer at grade P.3 as from 1 January 1984. His duties did not change. On 1 March 1984 he was transferred to a P.4 post, having won a competition, and was promoted to that grade as from 1 May of the same year. His fixed-term appointment was extended until 31 December 1989, and as from 1 January 1990 he was given a permanent appointment in another post, but at grade P.3.

On 22 November 1999 the complainant sent a memorandum to the Chief of the Personnel and Social Protection Department asking to be promoted to grade P.4 as from 1 January 2000. He considered that he met the first three requirements set out in Service Order No. 99 of 17 September 1998 on personal promotion: he had completed eighteen years' uninterrupted service with ITU, had not been promoted in the last ten years and had been at the highest step in his grade for more than a year. On 28 January 2000 the Chief of Personnel replied that he was not eligible for promotion: he did not meet the first requirement since short-term appointments are not counted in reckoning length of service. On 9 March the complainant asked the Secretary-General to reconsider that decision. Having received no reply he appealed to the Appeal Board in a memorandum of 24 May. In its report of 27 November 2000 the Board pointed out that Service Order No. 99 stated clearly the types of appointment to be counted in considering someone for personal promotion, and short-term contracts were not among them. It nonetheless found breach of the rules on short-term contracts in the complainant's case and recommended that the Secretary-General treat him as having been in continuous service since 16 November 1981, which made him eligible for personal promotion as from 16 November 1999. By a letter of 8 January 2001, the impugned decision, the Secretary-General rejected the appeal.

B. The complainant contends that his contracts between 1981 and 1983 ought to be reclassified so that they can be counted as part of a single period of service on either a fixed-term or an indefinite appointment. The Union broke its own rules by giving him a series of short-term contracts amounting to more than twelve months. Right from 16 November 1981, when the ITU first hired him, his duties were permanent in nature since he performed them for more than two years and after his transfer another official took them on. Therefore, the Union improperly refers to the type of appointments given to him in order to deny him promotion.

Furthermore, the ITU is in breach of the duty of good faith it owes to its staff: it treated him with negligence in that the Secretary-General failed to answer his request to have the Chief of Personnel's decision reconsidered, and time limits were exceeded in the internal procedure.

He wants the Tribunal to quash the impugned decision, declare that he met the length of service requirement and send the case back to the ITU for consideration of his claim. He seeks 5,000 Swiss francs in compensation for the injury caused by shortcomings in the internal procedure, and costs.

C. The ITU replies that the complaint is time-barred since the complainant seeks reconsideration of administrative decisions that date back to the period from 1981 to 1983. For reasons of expediency he is attempting to get his early contracts reclassified so that he meets a requirement set by a system of promotion which was elaborated and came into being nearly twenty years later.

In subsidiary pleas the ITU observes that it is easy enough *a posteriori* to assert that the complainant's duties were permanent. But when it first hired him, the Union was not in a position to tell whether the work would warrant keeping him on beyond the initial appointment. It denies breach of good faith in the way it treated his request.

D. The complainant retorts that he is not challenging his contracts for the period between 1981 and 1983. He submits that the ITU Administration, "paralysed by its own ... rules, had no choice but to break them". It may not rely on such "subterfuge" to deny him his right to promotion.

When the Union first employed him it knew full well that his assignment would last for more than twelve months. It hired him on the basis of a tacit agreement that his appointment would be long term. Indeed, his future supervisor had so assured him orally, otherwise he would not have accepted the offer. It was the Union, not he, who classified his early appointments wrongly at the time and it may not now hold him to blame. In his submission short-term contracts are omitted from Service Order No. 99 as counting towards length of service because they may not, as a rule, be longer than twelve months. But having broken that rule, the ITU must take them into account.

E. In its surrejoinder the ITU maintains that it was right to classify his appointments as short term. The assurances, if there were any, given by his former supervisor are not binding on the Union and have no

implications for the classification of contracts. It denies circumventing its own rules and resorting to "subterfuge": on the contrary, giving him short-term appointments "was rational ... in view of the circumstances at the time". Lastly, it maintains that whether or not his duties are permanent has no bearing on the classification of his contracts.

CONSIDERATIONS

1. The complainant joined the ITU on 16 November 1981 on a short-term appointment, which was extended a few times, until 2 September 1983. After a break of one month the Union gave him a further short-term contract, from 3 October to 31 December 1983, and as from 1 January 1984, a fixed-term appointment for one year as an analyst/programmer at grade P.3. Having won a competition he was transferred to a P.4 post as from 1 March 1984 and was promoted to that grade as from 1 May of the same year. Then, his fixed-term appointment was extended until 31 December 1989. After winning another competition he was appointed to a P.3 post on a permanent appointment. He states that he preferred to forego the higher grade (P.4) in favour of a permanent appointment and employment stability.

By a memorandum of 22 November 1999 he asked the Chief of the Personnel and Social Protection Department for promotion to grade P.4 as from 1 January 2000, pursuant to Service Order No. 99 of 17 September 1998 on personal promotion.

On 28 January 2000 the Chief of Personnel replied that the complainant was not eligible for personal promotion because he did not meet the first requirement for it: completion of eighteen years of continuous service "under a fixed-term, MRT (managed renewable term) or permanent contract".

On 9 March the complainant asked the Secretary-General to reconsider that decision. In his submission the period covered by short-term contracts at the beginning of his career should be taken into account, particularly as at the time the Union had broken the rules. Accordingly, the requisite eighteen years' uninterrupted service should be considered as being completed.

Having received no reply the complainant appealed to the Appeal Board on 24 May. On 27 November 2000 the Board recommended allowing his appeal, but the Secretary-General rejected it on 8 January 2001. That is the impugned decision.

2. The complainant is asking the Tribunal to quash that decision, to declare that he satisfied the length of service requirement for personal promotion and to send the case back to the ITU. He also seeks 5,000 Swiss francs for the injury he suffered owing to shortcomings in the internal procedure, and costs.

The Union contends that the Service Order is quite clear: short-term appointments are not to be counted. The contracts themselves state that they were short term, and since they carry the authority of final administrative decisions, there are no grounds to "reclassify" them *a posteriori* in order to rule on personal promotion.

3. (a) Personal promotion is awarded to enable the beneficiary to earn more than the remuneration corresponding to the post.

A decision to grant a personal promotion is by nature discretionary and, as such, subject only to limited review. The Tribunal will interfere only if it shows some fatal flaw, such as a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, or if it was *ultra vires*, or if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence (see, for example, Judgments 1500, *in re Pary* No. 4, 1815, *in re Gutiérrez* and 1973, *in re Siegfried*).

(b) The ITU introduced personal promotions in 1998. Service Order No. 99 sets the conditions and arrangements for awarding them.

Paragraph 1 to the Annex to Service Order No. 99 sets criteria for eligibility for personal promotion, of which there are six. The first reads:

- "a) the staff member has completed at least
 - 18 years (Professional category)
 - 20 years (General Service category)
- of continuous service in ITU, under a fixed-term, MRT or permanent contract;"

(c) The parties are in dispute as to how the provision requiring eighteen years of uninterrupted service is to be construed and applied.

The complainant argues that right from the start the intention on both sides was that he should remain in the organisation. Consequently, for the purposes of applying Service Order No. 99, the Union should treat his short-term appointments like his other appointments. He would then have served for eighteen years without a break. The Appeal Board argued likewise.

In rebuttal the Union makes two pleas. First, having opted for short-term contracts, the parties are now bound by them since they came into force unopposed. Secondly, the Union is adamant that its original intent was to employ the complainant for a short time. The job it hired him to do being a new one, it had no way of knowing at the time how long it would last. That was why it offered him a series of short-term contracts. Budgetary constraints also prevented it from giving him more stable employment. In any event he suffered no financial hardship from this "precarious" status, quite the contrary. As to the fact that the complainant's first short-term appointment exceeded the twelve months prescribed in Rule 1.A of the Staff Rules Applicable to Staff Members Engaged for Conferences and other Short-term Service, the Union observes that it can only cite the Secretary-General who, in his decision of 8 January 2001, found "no valid justification" in the complainant's personal file for an exception to the rule which has in any case caused him no injury. What is more, the complainant raised no objection at the time. As to the break between contracts from 3 September to 2 October 1983, the Union contends that it was in keeping with the rules on short-term appointments then in force. The ITU does not deny that the next short-term contract - for the end of 1983 - had been concluded before 3 September 1983.

4. The ITU is arguing that, in accordance with the principle of stability in administrative decisions, in determining whether the complainant fulfilled the first requirement, that is the completion of eighteen years of uninterrupted service, reference must be made to clauses of the contracts which came into force unopposed. In other words, what

were short-term contracts at the time are also short-term contracts for the purposes of applying Service Order No. 99.

The approach is too rigid. The principle of stability in administrative decisions might have been relevant if the issue was one of applying or interpreting the complainant's early appointments, but it is not. It is a matter of applying a rule which is currently in force and which concerns the legal nature of former contractual relationships between the parties. In other words, in the light of the current rule, what type of appointment did the early contracts establish? It should be noted that the name they were given will not necessarily express the actual relationship (see Judgments 701, *in re Bustos* and 702, *in re Guissi*, and also Judgment 1385, *in re Burt*).

5. (a) There is no proof that, when the first contract was signed, the Union already intended to employ the complainant beyond the short term. In fact, the ITU denies any such intention and it alone was in a position to assess its own requirements. It is not implausible that the ITU originally intended to limit the length of the complainant's appointment. It cannot therefore be concluded that the parties' real intention was not the one expressed by the short-term contracts, but to conclude one of the types of contract listed in Service Order No. 99.

(b) But the complainant's position in law may have changed once the maximum duration prescribed for short-term contracts – twelve months – was exceeded.

No sanction is prescribed for such a breach of the rules. The Tribunal has noted several times in the context of another organisation whose rules on short-term appointments provide that where the maximum period allowed for short-term contracts is exceeded, the rules applicable to officials on fixed-term appointments will also apply (see Judgments 1385, 1666, *in re Bedrikow* and 1687, *in re Bedrikow* No. 2).

That begs the question of whether, by analogy with the treatment accorded staff in other organisations and even in the absence of such rules, there are grounds for counting the months in excess of the twelve-month limit for short-term contracts towards the eighteen years of uninterrupted service specified in Service Order No. 99.

While there may be arguments for doing so, they do not suffice for the complaint to succeed: there would in any event be a shortfall in the requisite eighteen years, since the first twelve months are not counted. Besides, the Tribunal sees no reason to rule on a matter which is not current.

6. The complainant claims compensation in particular for alleged shortcomings in the internal procedure.

But the shortcomings are not fatal. Although it warranted thought and attention, the case was not such as to require particularly expeditious treatment. What is more, the complainant fails to show that he suffered any injury warranting redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

NINETY-SECOND SESSION

In re Throup

Judgment No. 2087

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Nichola Moya Throup against the International Criminal Police Organization (Interpol) on 19 April 2001, Interpol's reply of 5 June, the complainant's rejoinder of 2 July and the Organization's surrejoinder of 14 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1955 and is of British nationality. Between 1 July 1996 and 28 February 1998 she was employed by the Interpol General Secretariat in Lyons (France) on several fixed-term contracts. From 1 March 1998 she worked as an administrative assistant on a permanent contract. She tendered her resignation in a memorandum of 30 September 1999 and her contract was terminated on 31 December 1999.

In her memorandum the complainant explained that she had to resign because her husband, who worked for a company in Lyons, had been made redundant and was intending to seek employment in the south of France. She subsequently applied for a compensatory allowance under

Interpol's Internal Unemployment Compensation Scheme (IUCS). The Rules on the IUCS are contained in Appendix VIII to the Staff Rules. Article 11(1)(c) of the IUCS Rules states that compensation shall be payable pursuant to "legitimate resignation, particularly where the official concerned resigns in order to accompany a spouse who is obliged to live elsewhere for professional reasons". On 15 December 1999 the complainant provided a copy of her husband's redundancy letter, a statement from her husband notifying his decision to work for a law firm in the south of France and a certified statement by the law firm indicating its intention to offer him employment. On 17 August 2000 she wrote to the Secretary General saying that she had received no response to her request for the compensatory benefit and asking if he could expedite the process. The Secretary General referred the matter to the IUCS Committee.

On 24 August the Committee met to examine her case. Its conclusion was that the documents supplied by the complainant had not shown that her husband was obliged, at the date when she tendered her resignation, to move home because he had "effective employment". It proposed re-examining her case if she produced relevant proof. In a decision of 29 August the Secretary General refused her request to receive the allowance but gave her the opportunity to submit further documentation justifying the change of residence. The documents she submitted were already known to the Committee. In a second meeting, on 25 September, the Committee reaffirmed its earlier finding. By a decision of 6 October 2000 the Secretary General rejected her request to become a beneficiary. The complainant lodged an appeal on 30 October, arguing that she resigned for a "legitimate" reason, which was solely in order to accompany her husband who was obliged to live elsewhere "for professional reasons".

The Joint Appeals Committee issued its opinion on 29 January 2001. It found that there was an element of constraint in her resignation and recommended that it should be regarded as "legitimate". In a decision of 2 March 2001, the new Secretary General confirmed the decision taken by his predecessor and rejected the complainant's appeal. That is the impugned decision.

Unsuccessful attempts were made to reach a settlement by mutual agreement. In a letter of 27 April 2001 the complainant put forward a proposal based on the amount she would have received as a beneficiary under the IUCS.

B. The complainant questions first whether after the appeal stage of the IUCS procedure the Secretary General has the power to overrule the opinion of the Joint Appeals Committee. Its opinion should not be regarded as a "consultative opinion" that can be ignored, but rather as a "decision" taken under the IUCS Rules. She refers to Article 22(1) of the Rules which reads: "Any decision taken by the Secretary General after consultation of the IUCS Committee may be subject to appeal to the Joint Appeals Committee, or to the Administrative Tribunal ... after all internal means of appeal have been exhausted." Interpol staff, she points out, are not able to contribute to the French state unemployment insurance scheme and affiliation to the IUCS scheme is compulsory. The IUCS is jointly financed by Interpol and its employees. It is therefore unreasonable that the Secretary General should be able to overturn a "decision" made by the Appeals Committee in this type of appeal.

Secondly, the complainant contends that it is clear from the circumstances of her resignation, as set out in the documents she produced and in the report of the Joint Appeals Committee, that she is entitled to benefit under the IUCS.

She seeks the reversal of the Secretary General's decision of 2 March 2000 and asks to be admitted as a beneficiary of the scheme.

C. In its reply the Organization submits that the complaint is unfounded in fact and in law. It says that under the terms of the Staff Regulations and Rules the Secretary General does not have to follow the opinion of the Joint Appeals Committee. The Committee's opinion remains a consultative one. Indeed, Article 153(1) of the Staff Rules clearly states that "the Secretary General shall take into account the consultative opinion communicated to him but shall not be bound by it". The Committee does not have a different role in the case of internal appeals connected with the implementation of the unemployment insurance scheme.

The Organization expresses disagreement with the Joint Appeals Committee's interpretation of the documents produced by the complainant. Those documents do not prove that her husband was obliged to change his place of residence. He had no contractual promise of employment. The complainant did not produce evidence that she had resigned because her husband was obliged to live elsewhere for professional reasons, the condition mentioned in Article 11. Yet, there must be an element of obligation necessitating the change of residence. If that were not so it would distort the meaning of the words "for professional reasons" and would remove the "objective element" from the condition. It would result in a resignation being deemed "legitimate" for reasons deriving from personal convenience.

The Organization points out that in application of Article 50 of the Staff Regulations – on settlements by mutual agreement – the Secretary General proposed that the complainant should be allowed to benefit from the IUCS from the time when her husband did find employment. This would have been to her advantage as normally entitlement to compensation has to be determined on the actual date of resignation, but the complainant did not accept that course of action.

D. In her rejoinder the complainant states that she regards unemployment benefit as a fundamental right. She doubts whether the Secretary General has sole discretion to decide whether a person who has left Interpol is entitled to receive unemployment compensation. She wants to banish any suggestion that her "forced" resignation was considered to be for purely "personal convenience". She says that her initial claim was made in December 1999 and the supporting documents she provided were those requested by the Organization at the time.

Additionally, she queries whether Interpol can apply Article 50 of the Staff Regulations in the settlement of disputes regarding the IUCS scheme, but says it would seem reasonable for it to make a settlement on the basis of the proposal she made in her letter of 27 April 2001, the terms of which still hold.

E. In its surrejoinder the Organization states that the complainant's claim for compensation only dates from 17 August 2000, and she has not supplied proof that she made her claim at an earlier date. It examined the documents that she provided and confined itself to deciding on whether she was eligible to benefit under the IUCS Rules. In coming to his decision the Secretary General gave an objective interpretation of Article 11(1)(c).

Regarding a mutually agreed settlement, the Secretary General made legitimate use of the possibility open to him under Article 50. The complainant cannot appear to contest that such a settlement was allowed and, at the same time, press the proposal made on 27 April. The Organization observes that by pursuing the proceedings before the Tribunal it gave a clear indication that it had rejected her proposal.

CONSIDERATIONS

1. Interpol's Internal Unemployment Compensation Scheme (IUCS) was established to replace the French state unemployment insurance scheme to which Interpol officials do not contribute. The Rules governing the scheme are set out in Appendix VIII of the Staff Rules. Article 11(1)(c) of the IUCS Rules states that:

"(1) Compensation shall be payable pursuant to:

- ...
(c) legitimate resignation, particularly where the official concerned resigns in order to accompany a spouse who is obliged to live elsewhere for professional reasons."

2. By a memorandum of 30 September 1999 the complainant, who held a permanent contract, tendered her resignation stating that she had to resign due to her husband's loss of employment. She said it was his intention to seek employment in the south of France.

3. The complainant later requested that she should benefit from Article 11(1)(c) of the IUCS Rules. She provided a copy of a letter dated 29 September 1999 in which her husband was informed by his employer that due to reorganisation he would be made redundant; his post of Financial Director would cease to exist. Since he had not chosen to apply for other available posts, with effect from 1 October 1999, he was given

three months' notice of termination. The complainant also submitted a document dated 15 December 1999 in which her husband stated that after receiving the notification of his redundancy on 29 September 1999, he had decided to take up work in a lawyer's office in Montpellier and to move to that region, and that that was why he had asked his wife to resign from Interpol. A further statement from the lawyer's office concerned, dated 10 December 1999, certified that the complainant's husband who had undertaken assignments abroad in the past on behalf of the firm was expected to undertake similar activities for their clients in the very near future.

4. The complainant's request was examined by the IUCS Committee under Article 19 of the IUCS Rules. It refused her request on 24 August 2000 on the grounds that she had not furnished adequate proof that at the time when she gave in her notice on 30 September 1999 her husband was obliged to move home because he had effective employment. She was given the opportunity to provide such proof. She resubmitted the same documents. The Committee then re-examined her request but again refused it on 25 September 2000.

5. This was followed by a decision of the Secretary General dated 6 October 2000 refusing the request on the grounds that the proof furnished was not sufficient to show that her husband, at the time she gave in her notice, was obliged to change his residence because he had effective employment. The matter went before the Joint Appeals Committee. In its opinion, dated 29 January 2001, it found that the interpretation made by the Organization of "effective employment" was too restrictive and that the statement from the lawyer's office was equivalent to an offer of employment which justified a change of residence. It recommended that her resignation be considered legitimate.

6. The Secretary General did not share this view. He decided on 2 March 2001 to reject her appeal on the ground that her resignation did not count as a "legitimate" resignation. He said that the statement from the lawyer concerned a hypothetical situation and in the absence of the essential elements of an employment contract, it did not equate to an offer

of employment. He also stated that if the complainant's husband chose to change his place of residence for professional reasons, it was not because he was under any obligation to do so. Yet the requirement "for professional reasons", contained in Article 11, would lose all meaning if a resignation was deemed "legitimate" under that article in the absence of any obligation to change residence.

7. The complainant impugns the decision of 2 March. She advances two arguments:

- (1) That the Secretary General is not entitled to disregard the opinion of the Joint Appeals Committee. She submits that considering the wording of Article 22 of the IUCS Rules the "decision" of the Joint Appeals Committee should be considered final.
- (2) That, as set out in the opinion of the Joint Appeals Committee, she is entitled to be admitted as a beneficiary of the IUCS.

8. With regard to her first argument, the complainant is mistaken. Article 22(1) provides:

"Any decision taken by the Secretary General after consultation of the IUCS Committee may be subject to appeal to the Joint Appeals Committee, or to the Administrative Tribunal of the International Labour Organization (ILO) after all internal means of appeal have been exhausted."

9. The role of the Joint Appeals Committee is to provide a consultative opinion to the Secretary General. Article 153(1) of the Staff Rules states in part that:

"When making his decision, the Secretary General shall take into account the consultative opinion communicated to him but shall not be bound by it."

10. The purpose of Article 22 of the IUCS Rules is to refer back to the standard appeals procedure under which the Secretary General, after considering the consultative opinion of the Joint Appeals Committee, makes a final decision which can then be appealed to the Administrative Tribunal.

11. With regard to her claim to become a beneficiary under the IUCS, her resignation from Interpol would first have to be deemed "legitimate" in terms of Article 11(1)(c).

12. The Secretary General took the view, which was also shared by the IUCS Committee, that there must be an obligation on the official's spouse to move for professional reasons. The Tribunal agrees with this reasoning. The complainant's husband certainly chose to move, but this fell short of an obligation. The statement provided by the law firm did not amount to an offer of employment. When she submitted her resignation her husband was not obliged to move anywhere and therefore her resignation cannot be considered legitimate within the meaning of Article 11(1)(c) of the IUCS Rules.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN

Florida Ruth P. Romero

FLERIDA RUTH P. ROMERO



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Goli

Judgment No. 2088

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Rivka Cecile Goli against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 February 2001 and corrected on 6 April, UNESCO's reply of 22 May, the complainant's rejoinder of 29 June, and the Organization's surrejoinder of 10 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a citizen of Côte d'Ivoire and was born in 1956. She joined the Organization at its headquarters in Paris in 1982. At her request she was appointed in July 1995 to UNESCO's Liaison Office in Washington, D.C., where she held locally recruited status. On 1 November 1997 she was promoted to grade GS-5. Her fixed-term appointment was due to expire on 30 November 2000.

An incident occurred on 25 February 2000 between the complainant and her supervisor. In the scuffle, the complainant injured her ankle. The

Director-General asked the Deputy Director of the New York Office to investigate what happened. He did so and produced a report dated 17 March 2000. The acting Director of the Bureau of Personnel wrote to the complainant on 28 March. He referred to the report and told her that the Director-General intended closing the Office in Washington on 30 June 2000, and with effect from 2 May, would be reassigning her to headquarters. In subsequent correspondence, the complainant informed the Organization that she could not travel yet because of her injury. She also requested non-local status. In a memorandum of 24 May, the acting Director of Human Resources Management took note of the fact that the complainant had not returned to headquarters by 2 May and gave her until 19 June to report for duty. She contacted headquarters by fax on 13 June, attaching a letter from a therapist, which stated that she was not yet able to cope on public transport as she still had mobility problems.

By a memorandum of 29 June 2000 the same Director told the complainant that, as she had not taken up the post at headquarters, her contract would not be renewed when it expired on 30 November 2000 and she would be placed on special leave with full pay until that date. By means of a letter of 19 July 2000 to the Director-General she lodged a protest against that decision, requesting an "administrative review". The matter went to the Appeals Board. In its report of 4 December 2000 the Board recommended that the decision leading to the termination of her appointment should be revoked, and that she should be reinstated and paid the equivalent of three months' salary in compensation. The Director-General did not follow that recommendation and by a decision of 30 January 2001, which the complainant now impugns, he rejected her appeal.

B. The complainant states that the notice of non-renewal dated 29 June 2000 was "defective and unlawful". No reason was given for the termination of her employment other than the fact that a post had been kept open for her until 19 June. She can only assume that her appointment was ended because she failed to return to headquarters. She points out that she was partially incapacitated at the time as a result of the incident in February 2000, which meant that she had not been able to wind up her affairs in Washington within the required time-scale. Apart from providing

her with a plane ticket the Organization made no provision for her resettlement. The injury was attributable to her employment and UNESCO had failed to compensate her for the actions of her supervisor.

She further submits that the Organization did not respect the rules on termination. It made no provision for paying her the termination indemnity due under the terms of Staff Rule 109.5 [sic]. The insistence on her early return was unreasonable and constituted abuse of power. She repeatedly stated through her counsel that she was prepared to return to headquarters but was physically handicapped and needed additional time to relocate. Furthermore, she provided medical documentation from two sources confirming that.

The complainant seeks the rescinding of the memorandum of 29 June 2000, reinstatement and back payment of salary. The date of her transfer to a new post must be "reasonable and mutually agreed" and she wishes to be consulted in advance about the post she is offered. In the event of reinstatement she wants the Organization to: comply with Rules 107.9 and 107.10 on the transportation of personal effects and the removal of household goods respectively; agree an indemnity to cover the early cancellation of the lease on her apartment in Washington; arrange settlement of medical bills not otherwise covered by medical insurance and an indemnity for the physical injury suffered; and pay her moral damages for injury to her reputation and emotional stress. Alternatively, if reinstatement is not possible, she claims an indemnity under Rule 109.5 [sic] in an amount of eighteen months' salary; an indemnity for her medical costs and the physical injury suffered; and compensation for the abuses suffered and the wrongful termination of her contract.

C. The Organization rebuts the complainant's allegation that the decision not to renew her contract was unlawful. Her assignment to headquarters was an "exceptional measure for her benefit" in view of the closure of the Washington Liaison Office and the consequent abolition of her post. Given her length of service the Director-General decided to transfer her to Paris

and grant her non-local status. She refused this offer. In the memorandum of 24 May, she was warned that if she did not accept the offer and report for duty by 19 June, the Organization would have no option other than not renewing her appointment. According to precedent, the Organization is not required to substantiate a decision when the staff member concerned has been informed in the past of the reasons for the decision. The complainant knew very well that her contract would not be renewed if she failed to take up her assignment at headquarters by 19 June 2000. There was consequently no need to repeat the reasons for the impugned decision. Besides which, staff members are subject to the authority of the Director-General who may assign them to a particular post.

As to the arrangements for her transfer, the complainant was informed that she was entitled to the transportation of her personal effects. It was she who stalled the transportation of her belongings to Paris. The complainant's allegation of abuse of power is unfounded. In order to ascertain the state of her health, the Organization's Chief Medical Officer arranged for her to be examined by the World Bank's Chief Medical Officer. The latter found that travel posed no significant problem, as long as she avoided prolonged periods of standing or walking. The medical reasons the complainant put forward were but a pretext; she did not intend returning to Paris. The Medical Benefits Fund has regularly reimbursed the costs of the complainant's treatment. Some reimbursements that she claims not to have received either concern invoices not yet submitted to the Organization, or ones received after her separation from the Organization.

Rule 109.5 b) concerns staff on indeterminate appointments, and as the complainant had a fixed-term contract it did not apply to her. In addition, her claim to compensation relating to her injury is premature because she has submitted a claim to the Advisory Board on Compensation Claims and it is currently being processed.

D. In her rejoinder the complainant presses her claims for redress and asks for costs. She submits that she was on official sick leave at the time

when the Organization took the decision to end her contract. Furthermore, there were no exceptional circumstances justifying placing her on special leave. In so doing the Organization showed prejudice against her.

She contends that there was hostility towards her on the part of officials within the Bureau of Personnel and the Organization did not treat her fairly. There was, she says, lack of due process in the handling of her request for administrative review and in the ensuing appeal. Moreover, UNESCO failed to consult the relevant personnel advisory board, as required to do when a staff member's contract is not renewed after five years or more of service.

E. In its surrejoinder the Organization states that her complaint is devoid of merit. It fully observed the internal appeal procedures in dealing with her case. It was the complainant herself who did not wait for the expiration of some of the time limits involved.

It points out that the complainant did not formally notify the Administration of any sick leave during the period at issue, and the Medical Service has no record of any relevant medical certificate.

The Organization was justified in placing the complainant on special leave with full pay under Staff Rule 105.2. There were "exceptional circumstances" within the meaning of that Rule in that the Washington Office was due to close.

Since the complainant was a local staff member in the field there was no need to consult the board that she mentions about the non-renewal of her contract.

CONSIDERATIONS

1. The complainant was employed, at the material time, in UNESCO's Washington Liaison Office as a secretary with locally recruited status. She held grade GS-5 and was on a fixed-term appointment which was due to expire on 30 November 2000.

2. An incident occurred on 25 February 2000 between the complainant and her supervisor, who gave conflicting accounts of what happened. The complainant sprained her ankle. The Organization requested the Deputy Director of the New York Office to enquire into the incident. He reported on 17 March that he was unable to determine who was responsible for the incident. He concluded that it was not conceivable for the two colleagues to continue working in the same unit and on the same premises, particularly as they were the only two members in that unit.

3. The Washington Liaison Office was due to be closed on 30 June 2000. By a letter of 28 March 2000 the Director-General recalled the complainant to Paris; he intended leaving her a reasonable period to prepare for her removal. He fixed 2 May 2000 as the date when her new appointment would take effect. As she had the status of a locally recruited staff member, this decision was exceptional.

4. The complainant replied on 29 March 2000 saying that it would be impossible for her to move. She said her doctor had prescribed treatment for her ankle for six weeks. She had to use crutches to walk and had to travel by taxi to and from her office and had had to go to a hospital twice a week since 9 March. By a memorandum dated 14 April the complainant was given details of her new position in the Bureau for Support and Services.

5. In a memorandum of even date she sought clarification about her status. She was informed by a memorandum of 24 May that the date for reporting for duty had been extended to 19 June 2000. She was also told that the offer would not be held open beyond that date.

6. On 13 June the complainant forwarded a letter from her physical therapist saying she was unable to use public transportation and was unable to travel because of restricted mobility. She was asked to report without delay to the World Bank's Chief Medical Officer for a consultation. In his

report the latter said that he had examined her and had also spoken to the complainant's physician and physical therapist who said travel posed no significant problem provided she avoided prolonged periods of weight-bearing and took common sense precautions. The complainant was informed of this report on 8 June and was further informed on 15 June that her state of health would permit her to travel as long as she took certain simple precautions.

7. She failed to turn up for her new assignment. She was notified by a memorandum of 29 June that her contract would not be renewed and she would be placed on special leave with full pay from 1 July to 30 November 2000, the date of expiry of her contract.

8. On 19 July 2000 she lodged a protest against the decision with the Director-General.

9. Without waiting for his reply she lodged an appeal with the Appeals Board on 27 July. In its report of 4 December 2000 the Board recommended that the decision of 29 June 2000 be revoked, and that she should be reinstated with full payment of medical and transport bills together with three months' salary as compensation for moral and physical prejudice. It recommended a fresh medical examination to determine whether she was fit to take up her duties at headquarters.

10. The Director-General, by a letter dated 30 January 2001, said that having considered the opinion of the Appeals Board he had decided to reject her appeal. That is the decision impugned.

11. The complainant claims:

- (a) Rescission of the memorandum of 29 June 2000 and reinstatement with back pay.
- (b) A mutually agreed date for transfer to a new post on which she should be consulted in advance.
- (c) Administrative decisions applying Staff Rules 107.9 and 107.10 and an agreed indemnity for early cancellation of the lease on her apartment.

- (d) Payment of medical bills not covered by insurance and an indemnity for physical injury.
 - (e) Moral damages for injury to her reputation and emotional stress.
- Alternatively, if she is not reinstated:
- (i) An indemnity under Staff Rule 109.5 [*sic*] equal to eighteen months' salary.
 - (ii) An indemnity for her medical costs and physical injury suffered.
 - (iii) A "maximum indemnity" for abuses she suffered and wrongful termination.

12. She contends that when ordered to return by 19 June 2000 she was partially incapacitated, and had not had time to wind up her affairs in Washington and dispose of her apartment. No provision was made for her resettlement and no personnel action form was sent to her; she was only provided with a plane ticket. She claims the application of Rules 107.1(a)(ii), 107.8, 107.9(a)(c)(d) and (f) and 107.10.

13. Rule 107.1(a)(ii) provides that the Organization will pay travel expenses on a change of duty station. Rule 107.8 sets out what is included in travel expenses, such as tickets, subsistence allowance, passport fees or similar and other incidental expenses occasioned by authorised travel. Rule 107.9 concerns the transportation costs of personal effects and Rule 107.10 concerns the removal of household goods.

14. The Tribunal is satisfied that the memorandum of 24 May 2000 informed the complainant that the transportation of her personal effects would be paid for. When the removal experts contacted her on 31 May 2000 she said she was not yet ready. Therefore, it cannot be said that the Organization denied the complainant travel and removal expenses.

This plea fails.

15. The complainant contends that the memorandum of 29 June 2000, which stated that her contract would not be renewed, is defective because

it does not give a reason for the termination of her service. She claims that Rule 109.5(b) which deals with termination, has not been respected. Furthermore, the requirement that she return to headquarters before complete recovery from her injury and without sufficient time to wind up her affairs, was unreasonable and an abuse of power. If her service was terminated, under Rule 109.5 [sic] she is entitled to an indemnity of eighteen months' salary.

16. The Organization submits that the post the complainant occupied was to be abolished because of the closure of the Washington Office on 30 June 2000. In the ordinary way, as she had locally-recruited status, she would have been separated from service on closure of the Office. Exceptionally, she was given non-local status when the Director-General decided to transfer her to Paris. She was told of her transfer on 28 March 2000 being required to report for duty on 2 May; however, she was then given an extension to 19 June 2000 on the understanding that the position would not be held open beyond that date. On 8 and 15 June the doctors she had consulted said she could travel. The Organization told her on 29 June 2000 that, since she had not reported for duty at headquarters in spite of the precise information she was given, her contract would not be renewed.

17. The Tribunal is satisfied that this is quite clearly the reason given for non-renewal of her fixed-term contract. Therefore, the decision of 29 June shows no flaw.

18. Rule 109.5, dealing with termination, which the complainant claims should have been applied to her only applies to staff members holding indeterminate appointments. She did not hold such a contract.

This claim fails.

19. Concerning the alleged unreasonableness of requiring the complainant to travel in spite of her physical disability, the complainant presented a letter from her physical therapist who said she could not travel because of mobility limitations. But the Chief Medical Officer of the World Bank, who had examined the complainant, spoke with her attending

physician and her physical therapist. In a report addressed to UNESCO's Chief Medical Officer he said that the therapist had told him that travel posed no significant problem for the complainant, provided she avoided prolonged periods of weight-bearing. He said that although the therapist had sent an earlier letter to UNESCO recommending that the complainant should not travel, that recommendation applied to travel involving significant distance walking. Therefore, it becomes clear from the above that far from being told she could not travel by air to Paris, the complainant's own physical therapist saw no problem provided sensible precautions were taken.

20. It appears to the Tribunal that the complainant made no effort to comply with the directive to report for duty on 19 June. There are absolutely no details about the type of lease she had on her apartment, or any details in relation to the removal of household or personal effects. No information is given as to why it was impossible to organise this. It was up to her to make arrangements, which she did not do. The Director-General conferred an exceptional benefit on her by offering to give her non-local status which would have entitled her to travel and removal expenses. She did not take up the offer.

The Tribunal is satisfied that the Organization did not behave unreasonably and that there was no abuse of authority.

21. The Organization denies that it has not paid the complainant's medical bills. It says the Medical Benefits Fund regularly reimbursed the cost of her treatment. Any unpaid bills concern invoices not received by the Organization's Medical Service or treatment which took place after she left.

22. As regards the claim to the entitlement to compensation for service-incurred injury, that claim had to be made through the Advisory Board on Compensation Claims and is currently being processed. It is therefore premature, and not receivable.

23. The complainant argues that she has legal rights in the United States.

The references to her rights under United States law do not concern the Tribunal. The Tribunal's competence extends only to complaints alleging non-observance, in substance or in form, of the terms of her employment or the provisions of the Staff Regulations and Rules.

24. In her rejoinder the complainant contends that her service was terminated while she was on official sick leave. The Organization says she was never on sick leave and there is no evidence to that effect. Her claim that she took sick leave is contradicted by her letter of 29 March 2000 which says she had to travel by taxi to and from her office.

This plea fails.

25. She also contends that under Rule 104.1(b) a personnel advisory board should have been consulted about non-renewal. But the Organization explains that under Rule 104.1(c) there is no need to consult such a board on the non-renewal of the complainant's appointment since she was a local staff member in the field. The Tribunal accepts the Organization's argument.

This plea fails.

26. She also submits that the Director-General had no right to put her on special leave under Rule 105.2. But the Administration argues that it is allowed in exceptional circumstances. There were special circumstances in that the Washington Office was due to be closed on 30 June and after that date she could no longer work there.

This plea fails.

27. The complainant is not entitled to any of the relief claimed set out under 11(a) to (e) above. Neither is she entitled to the alternative relief sought at (ii) and (iii). However, she also seeks at (i) a termination indemnity under Rule 109.5 which does not deal with indemnities. These are in fact dealt with under 109.7 which provides (inter alia) that on termination of a fixed-term appointment after six years or more of service,

owing to abolition of post, a termination indemnity calculated on length of service is payable according to the schedule given.

Before the Appeals Board the complainant did make a claim under Rule 109.7. The question of a termination indemnity was not argued before the Tribunal probably because the complainant did not cite the number of the Staff Rule correctly. The Tribunal considers that the question of a claim under 109.7 (mistakenly referred to as 109.5) should be returned to the parties for argument on this single issue, reserving the question of costs.

The Organization shall reply to paragraph 28 of the complainant's pleadings as if it referred to Staff Rule 109.7 within thirty days from notification of the present judgment.

The complainant shall be entitled to file a rejoinder within thirty days of receipt of the reply.

The Organization shall be entitled to file a surrejoinder within thirty days of receipt of the rejoinder.

DECISION

For the above reasons,

1. The question of a claim for termination indemnity under Rule 109.7 is returned to the parties for argument as set out in paragraph 27, reserving the question of costs.
2. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Berthet (No. 3), Delius,
Glöckner (No. 6), Robrahn
and Stegmüller (No. 2)

Judgment No. 2089

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs Carmen Berthet (her third), Mr Hajo Barnim Rudolf Delius, Mrs Godefrida Cornelia Glöckner (her sixth), Mr Bernd Robrahn, and Mr Albert Stegmüller (his second) against the European Molecular Biology Laboratory (EMBL) on 6 November 2000, the EMBL's reply of 17 January 2001, the complainants' rejoinder of 23 April, and the Laboratory's surrejoinder of 28 May 2001;

Considering the applications to intervene filed by:

W. Ackermann	E. Honig
P. Bendall	N. Jagt-Gonzalez, van der
J.-M. Bois	A. Jones
T. Creighton	C. Kjær
M. T. Dauvergne	M. Koch
F. Dauvergne	R. Leberman
H. Flösser	K. Leonard
A. Gabriel	C. Moritz
G. Griffiths	K. Müller
N. Hassler	T. Poulsen
H. Herzog	E. Schechinger
M. Holmes	J. Schulze-Eyßing

J. Sedita	P. Tucker
L. Serrano	H. Virta
A. Simon	A. Walter
J. Stegemann	O. Wernz
C. Stettner	W. Winkler
N. Strausfeld	H. Wittmann
J. Tooze	J. Zimmermann
D. Tsernoglou	

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants and interveners are all staff members, pensioners or pending pensioners of the Laboratory. They contest an amendment to Article 36 (on adjustment of benefits) of the EMBL Pension Scheme Rules which was adopted by the EMBL Council on 5 July 2000 and notified to all staff by the Administrative Director on 10 July.

The EMBL's Pension Scheme, introduced in 1978, had been modelled on that of the Coordinated Organizations* which the Laboratory used as a standard of reference for the adjustment of pensions. In 1986 the Working Group on the review of the Staff Rules and Regulations was charged with examining: (a) how to adapt the Pension Scheme Rules to the specific needs of the EMBL; and (b) alternative possibilities for financing a pension system. The Working Group recommended that the EMBL retain its current Pension Scheme and proposed certain amendments to the Rules to make the scheme consistent with actual practice. In particular, noting

* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

that the EMBL Council was already following the recommendation made by the Co-ordinating Committee of the Coordinated Organizations in its 150th Report (dated 4 April 1978), the Working Group decided not to propose any amendment to Article 36, which then read:

"Should Council decide on an adjustment of salaries in relation to the cost of living, it shall grant at the time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred.

Should salary adjustments be made in relation to the standard of living, Council shall consider whether an appropriate adjustment of pensions should be made."

The EMBL Council accepted this recommendation at its meeting in July 1986.

At its meeting held on 21 March 2000 the Council approved a resolution, *inter alia*, withdrawing the decision it had taken in July 1986 on the adjustment of pensions. That resolution also allowed for the amendment to Article 36. The Council approved the amendment to Article 36 at its meeting in July 2000. It now reads:

"Pensions currently being paid, and pensions whose payment is deferred, shall be adjusted annually through the application of a cost of living index to be determined by Council.

Where a cost of living index is used in considering the annual adjustment of salaries this shall be the index applied to pensions."

On 4 August the complainants filed identical internal appeals against the decision to amend Article 36 of the Pension Scheme Rules. In their appeals they requested authorisation to appeal directly to the Tribunal if the EMBL was unable to grant their requests. On 9 August the Administrative Director, on delegated authority from the Director-General, rejected the requests. He stated that it would not be appropriate to consider the appeals internally and authorised the complainants to appeal directly to the Tribunal. That is the impugned decision.

B. The complainants contend that the amendment to Article 36 is invalid and constitutes "an arbitrary breach of contract". The Staff Rules and Regulations, which includes those on the Pension Scheme, are part of the individual employment contract of staff members. Citing Judgment 61 (*in re Lindsey*), the complainants submit that provisions which refer to the individual terms and conditions of employment may not be changed unilaterally to the detriment of a staff member; this means that the new,

detrimental method of adjusting pensions can only be applied to new staff members joining the Pension Scheme. The EMBL has not put forward any valid reason to justify the change in how pensions were to be adjusted. They submit, citing the Tribunal in Judgment 1821 (*in re Allaert and Warmels No. 3*), that the mere desire to save money, and this at the staff's expense, is not, by itself, a valid reason to deviate from an established practice of adjustment.

The decision to deviate from the policy of identical adjustments to both salary and pensions violates the principle of equality of treatment and leads to discrimination against pensioners. It also creates discrimination between pensioners who receive a pension immediately upon retiring from the Laboratory and those who left the employment of the Laboratory but whose pensions are "pending" until retirement age. The latter's pensions will be lower than the former's, having been adjusted solely on the basis of the cost-of-living increase, whereas the former's will be based on the latest salary which will have been adjusted on the basis of the standard-of-living increase as well. They also claim that there is discrimination in terms of pensioners' contributions to the health insurance scheme.

Lastly, they argue that the amendment breaches the principle of good faith. The policy of the Coordinated Organizations to adopt identical rates of adjustment for both salaries and pensions had been followed for twenty-two years, and on this basis some staff members, among them three of the complainants, had transferred their pension rights into the EMBL Pension Scheme.

The complainants request the Tribunal to quash the amendment to Article 36 and to order the Laboratory to adjust pensions from 1 July 2000 onwards through the application of both the cost-of-living index as well as the standard-of-living index as formerly adopted by the EMBL from the Coordinated Organizations Pension Scheme; to order the Laboratory to pay at least 10 per cent interest on the amounts to be paid retroactively to the pensioners; and to order the payment of at least 20,000 German marks for costs.

C. Although the former Article 36 had been in force for twenty-two years, the Laboratory submits that it was applied only recently, when

the EMBL actually began paying pensions. Furthermore, while the EMBL Pension Scheme was modelled on that of the Coordinated Organizations, there was never a binding commitment to follow the latter's recommendations in the interpretation of the EMBL Pension Scheme. When the Working Group carried out the comprehensive review of the Pension Scheme and its rules in 1986, its entire Report, and not only the part concerning Article 36, was accepted by the Council.

When the Council adopted the 1999 pension adjustment it was not fully aware of the 1986 decision, and only took account of the consumer price index. Following an appeal, an adjustment was made taking account of both cost-of-living and standard-of-living indexes. The Council agreed at that time, however, that Article 36 would henceforth be amended. Moreover, there were financial and legal complications since the Laboratory did not have a pension fund and it was only in January 2001 that one was established. The proposed amendment was referred to the Standing Advisory Committee, whose advice led to the decision to make a cost-of-living adjustment mandatory, even in the absence of a salary increase. Adjustment on the basis of standard of living was always discretionary, even under the previous wording of Article 36.

The amendment to Article 36 does not constitute an arbitrary breach of contract. The standard contract provisions provide that the Staff Regulations may be altered following a decision by the EMBL Council. It is clear from the reference in the standard contract clauses to the Staff Regulations that the Pension Scheme Rules in general, and the pension adjustment procedure, are not part of a staff member's personal contract. The defendant organisation adds that the amendment to Article 36 does not infringe the principle of acquired rights either, since the rules on adjustment of pensions provided for in the original wording of Article 36 cannot be considered as a fundamental and essential term in consideration of which staff members accepted appointment. The EMBL cites the case law of the Tribunal in Judgment 832 (*in re Ayoub*) in support of its argument. The complainants' pension rights have not been affected in substance by the amendment. In fact, the Council's decision replaces pension adjustments by reference to salary adjustments with a mandatory and automatic adjustment by reference to a cost-of-living

index. Consequently, the purchasing power of pensions is maintained independently of any decisions taken on the adjustment of salaries. The amendment was made in consideration of the long-term interest of the financial health of both the Scheme and pensions.

There has been no breach of the principle of equality of treatment. Pensions are not necessarily linked to a trend of increased salaries relating to a higher standard of living. In addition, the adjustment of pensions based on salary adjustment did not guarantee a full cost-of-living adjustment. The new procedure, which provides that guarantee, cannot be considered arbitrary or discriminatory. It is also reasonable that pensions may vary between a pensioner that deferred his pension for a period and a pensioner that received his pension immediately upon retirement. Nor was there a discriminatory effect on pensioners' health insurance contributions.

The Laboratory submits that the revision of its Pension Scheme, which includes the amendment made to Article 36, did not breach the principle of good faith. It is not obligated to follow the rules and practices of the Coordinated Organizations in pension scheme matters, and it must review regularly the financial stability of its Pension Scheme. This serves its own interest as well as that of the staff. The Council has taken care to protect the legitimate interest of pensioners to have a stable pension system which provides them with an adequate measure of protection from cost of living changes occurring after their retirement.

D. In their rejoinder the complainants submit that the Laboratory has failed to establish concrete reasons why detrimental changes to the pensions' annual adjustment method were adopted by the Council. They argue that the decision of the Council in 1986 cancelled any discretionary right to decide on granting a standard-of-living adjustment. Benefits to pensioners have been reduced and acquired rights affected. A mandatory cost-of-living adjustment will not necessarily be an advantage for pensioners since the cost-of-living index will be decided by the Council.

They add that the EMBL Pension Scheme is a part of the individual terms and conditions of contract, particularly for those staff members who already had an indefinite contract when the Pension Scheme came into force: those staff members had the possibility either to participate in the

Laboratory's Scheme or to remain with the respective national social security system. Their choice was made on the basis of the Pension Scheme Rules in force at the time and they might have opted differently if they had known that, after twenty-two years of contributions, the rules were to change.

E. In its surrejoinder the Laboratory states that the complainants have failed to recognise that Article 36, in its original version, did not contain any right for pensioners to be granted a pension adjustment identical to salary adjustment. The amendment must be seen in the context of a comprehensive review of the Pension Scheme. The new Article 36 has clearly improved the legal right of pensioners to be granted an automatic pension adjustment which guarantees the purchasing power of pensions.

The pension adjustment procedure is not a part of the individual employment contract. The right of an international organisation to modify its pension scheme rules has been generally recognised. The staff members' right to maintain the substance of their pension rights does not amount to a contractual right to unchanged pension scheme rules. The Tribunal's case law does not lead to the interpretation that, owing to the fact that Article 36 remained unchanged for many years, it cannot be changed now.

CONSIDERATIONS

1. The complainants are all staff members or pensioners of the EMBL. The interveners are pensioners, pending pensioners, or staff members of the Laboratory; their claims to intervener status not being contested and their interest in the complaint being patent, the requests for intervention are granted.

2. The complaint attacks a decision of the EMBL Council amending Article 36 of the EMBL's Pension Scheme Rules. While the Tribunal cannot grant the claim for quashing that amended article and the complaint is, to that extent, irreceivable, the Tribunal will treat it as a

complaint against the application of the amended article in breach of the complainants' acquired rights. There is no other objection to receivability.

3. The Pension Scheme was introduced by the Laboratory in 1978. It was an unfunded scheme and pensions, when they became due (which was not until quite recently), were to be paid out of the EMBL's budget. The original version of Article 36 provided for the periodic adjustment of pensions as mentioned under A above.

4. Thus, cost-of-living adjustments to pensions were tied to cost-of-living adjustments to salaries both in frequency and amount. However, standard-of-living adjustments were left to Council's discretion and did not have to be made to pensions even when they were made to salaries.

5. In 1986, the Council adopted a report recommending the adoption of the practice followed by the Coordinated Organizations of adjusting salaries and pensions together in accordance with both the standard of living and the cost of living. In 1999, following a recommendation of the Joint Advisory Appeals Board, the Council accepted that the effect of the 1986 decision had been to bind the Laboratory to follow the practice followed by the Coordinated Organizations in adjusting both salaries and pensions in accordance with both cost-of-living and standard-of-living adjustments. Internal appeals brought by both staff members and pensioners were considered favourably by the Appeals Board.

6. In March 2000, the Council decided to adjust the 1999 pensions as they had been adjusted in the past, but also to withdraw its 1986 decision on the adjustment of pensions. In July 2000 it adopted the amended version of Article 36 which is the gist of the case. The text as it now reads is mentioned under A above.

7. This text makes cost-of-living adjustment of pensions mandatory for pensions even if no such adjustment is made to salaries; no provision is made for standard-of-living adjustment to pensions.

8. The complainants argue that the amendment violates the policy adopted by the Council in 1986 and that such a policy had been in practice since 1978; they claim it is still in force. The amendment constitutes an arbitrary breach of the employment contract and their acquired rights: provisions of the Staff Rules and Regulations, which include the Pension Scheme Rules, cannot be changed "one-sidedly" to the detriment of the staff member. The mere desire to save money is not a valid reason to deviate from an established practice. The amendment breaches the principle of equality of treatment under both the pension and health insurance schemes and the principle of good faith. The complainants claim: (1) the quashing of the amendment to Article 36 and an adjustment of their pensions from 1 July 2000 onwards, using both the cost-of-living index and the standard-of-living index; (2) at least 10 per cent interest on the amounts to be paid retroactively; and (3) at least 20,000 German marks in costs.

9. Most of the complainants' arguments can be disposed of summarily. In the face of the express wording of the former Article 36, it is simply untenable to argue that the Laboratory could, by following the practice of the Coordinated Organizations in previous years, bind itself to do so for all time. Even if the 1986 decision of the Council did have the effect of obliging the EMBL to follow the Coordinated Organizations' practice in the future (a matter on which the Tribunal expresses no opinion), there can be no doubt that the same body that had the authority to adopt such a decision had equally the authority to decide to withdraw it. It may be noted as well that that decision, taken in March 2000, was not made the subject of an internal appeal or of a complaint before the Tribunal. Nor can it be seriously argued that the decision to adopt the amended Article 36 was arbitrary: it was taken in the context of a major revision of the Pension Scheme and its Rules which involved the funding of pensions which had previously been unfunded and the Council had considered, from the actuarial assessment about future costs, the possible consequences of not doing so. There is no evidence that the amended Article 36 breaches the principle of equality of treatment or that the Council acted other than in good faith and after full notice to, and consultation with, the Staff Association.

10. The true thrust of the complainants' case, and the only aspect which requires serious consideration, is that the amendment breaches certain of their acquired rights. The complainants lay particular emphasis on Judgment 61 in which the Tribunal stated the following:

"12. The terms of appointment of international civil servants and, in particular, those of the officials of the [Organisation], derive both from the stipulations of a strictly individual character in their contract of appointment and from Staff Regulations and Rules, which the contract of employment by reference incorporates. Owing, *inter alia*, to their increasing complexity, the conditions of service mainly appear not amongst the stipulations specifically set out in the contract of appointment but in the provisions of the above-mentioned Staff Regulations and Rules. The Staff Regulations and Rules contain in effect two types of provisions, the nature of which differs according to the objects to which they are directed. It is necessary to distinguish, on the one hand provisions which appertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and subject to variation, and, on the other hand, provisions which appertain to the individual terms and conditions of an official, in consideration of which he accepted appointment. Provisions of the first type are statutory in character and may be modified at any time in the interest of the service, subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them. Conversely, provisions of the second type should to a large extent be assimilated to contractual stipulations. Hence, if the efficient functioning of the organisation in the general interest of the international community requires that the latter type of provisions should not be frozen at the date of appointment and continue so for its entire duration, such provisions may be modified in respect of a serving official and without his consent but only in so far as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment.

...
18. After being a member of the Pension Fund of the [Organisation] until 31 December 1959, complainant was affiliated on that date to the United Nations Joint Staff Pension Fund. Since then his rights as an insured person are determined no longer by organs of the [Organisation] but by the Joint Staff Pension Board and by the General Assembly of the United Nations. Moreover, while the contributions payable by him since 1 January 1960 have been barely higher than those for which he was previously liable, the contribution of the [Organisation] to the Joint Fund are markedly lower than those which the [Organisation] used to make to its own Fund. In addition, under the old scheme the maximum amount of complainant's pension corresponded to 60 per cent of his insured earnings, whereas under the new scheme it corresponds to only 54,5 per cent. Actually, it is doubtful whether, taken in isolation, these various changes seriously impaired a right that could have induced complainant to enter the service of the [Organisation], but taken in conjunction the changes did have this effect. Therefore by making the changes applicable to complainant the [Organisation] infringed the terms of his appointment."

11. Thus, the Tribunal held that it was "doubtful" that either "markedly" lower employer contributions to a staff pension fund or a reduction of about 9 per cent in pension (from 60 per cent of insured earnings to 54.5 per cent) would by themselves be enough to impair seriously an employee's acquired rights, but that taken in combination they were.

12. The Tribunal returned to the question of acquired rights in Judgment 832 (*in re Ayoub*). It said:

"13. In Judgment 61 (*in re Lindsey*) the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment.

That calls for some explanation.

Although there will be breach of an acquired right only if one of two conditions is fulfilled, the two are in fact but one. Disturbance of the structure of the contract posits impairment of a fundamental term, and the latter the former.

A somewhat broader framing of the doctrine is wanted so that it will cover not just terms of appointment that were in effect at recruitment but also terms that were brought in later and were calculated to induce the staff member to stay on.

The reference to a 'term of appointment in consideration of which the official accepted appointment' was never meant to import a subjective test: did this term or that actually make the staff member sign on or decide to stay? What the Tribunal had in mind was a term of the sort that might sway his decision.

In some instances only the existence of a particular term of appointment may form the subject of an acquired right. But there are other contingencies in which the arrangements for giving effect to the term may also give rise to such a right.

Stated in that way the doctrine is broader than the rule against retroactivity. Whereas the doctrine looks to the future as well as to the past, the rule merely forbids altering what already belongs to the past.

So before ruling on the plea the Tribunal must in each case determine whether the altered term is fundamental and essential.

14. There are three tests it will apply.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such

as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

15. How do the three tests apply to the present case?

The complainants argue an acquired right to application of the old scale of pensionable remuneration as prescribed in Article 3.1.1 of the Staff Regulations before the recent amendments. So they are relying not on the contract or on any decision but on a rule, their right to the safeguarding of their conditions of service is not an unqualified one, and what matters especially is the reasons for and consequences of the amendments to 3.1.1.

Pensionable remuneration has greatly altered with circumstances. The Assembly made it equivalent to net salary, to semi-gross salary and then to gross salary, with due regard to the weighted average of post adjustment. Contributions and benefits have changed time and again. Indeed the reckoning of the pension depends on such factors as the cost of living, currency rates and rates of tax in the country of the pensioner's residence. Those are variables that may preclude the creation of acquired rights. The financial plight of the Fund has over the years become alarming. To treat pensionable remuneration as a fundamental condition of service, an acquired right, and therefore inviolate, might be to overlook the real difficulties facing the Fund and the agencies.

The cut in pensionable remuneration does of course harm the complainants' interests. International civil servants quite understandably put stock in their retirement benefits and quite rightly want an income that, even if it will not sustain the same standard of living, will at least be comfortable. The decisions impugned do mar the outlook, in some cases seriously. But that is not enough to establish breach of an acquired right. The decisions plainly do not affect everyone to the same extent. Because of promotion or increments some are likely to get at least as much on retirement as they would have got under the old scale on retirement by 1 April 1985. What is more, the reduction in pensionable remuneration affects only senior officials and staff in lower grades fare better under the new scale than they did under the old. Despite the new scale international civil servants still stand to get bigger pensions than the best-paid national civil servants. And on 18 December 1985 the Assembly approved transitional measures that help some staff.

The Tribunal concludes that because the altered term is in the rules and because of the reasons for the amendment, and notwithstanding the financial injury to the complainants, there was no breach of an acquired right. Yet if the injury increased because of decisions that are not now before the Tribunal there might be further review."

13. In that case the Tribunal refused to find a breach of acquired rights even where there was no doubt of "financial injury" and the outlook for the pension income of the complainants was "mar[red] ... seriously".

14. How does the present case measure up against the three tests enumerated in Ayoub? The source of the claimed right is not in the article itself, for the former Article 36 was clear that adjustments for standard of living (as well as those for cost of living) were at the discretion of the Council. It is not in the complainants' terms of employment, for their contracts are silent on the matter. Nor can it be said to arise from the Council's decision of 1986, for there is nothing in that decision which speaks to its permanency; it was in fact withdrawn in March 2000 and the complainants did nothing to appeal or lodge a timely complaint against that action. The most the complainants can invoke is a "practice" in that for a relatively limited number of years the Laboratory did in fact adjust pensions in line with adjustments to salaries to reflect changes in both cost of living and standard of living. While the Tribunal does not preclude the possibility of a practice becoming the source of an acquired right, such a finding would require a great deal more than is present in this case.

15. The second test looks at the reason for the change. Here, despite the complainants' assertion to that effect, it is manifest that the change was not made "merely" to save money; the Tribunal's decisions have, however, always recognised the legitimacy of financial considerations. Far from being a mere money-saving measure, the establishment of a funded pension scheme will require increased employer contributions and substantial additional expenditure by the Laboratory and its aim is to provide much greater security for the pensions both of the complainants and of all future pensioners. It is to no avail that the complainants criticise the effectiveness of the change or the accuracy of the calculations on which it was based, for those are not matters within the Tribunal's competence. As long as there is no suggestion in the evidence – and there is none – that the stated reasons are simply a screen to hide an ulterior motive, the Tribunal will not attribute such motive to the Laboratory.

16. Finally, the third test looks at the impact of the change and the consequence of allowing an acquired right. The claimed right would ensure that pensions were always adjusted in exactly the same way as salary scales, whereas the change would keep the base pension at the salary scale in effect at the time of leaving the Laboratory but require an

obligatory adjustment to that base to keep pace with the cost of living. In a time of salary inflation and strong economic growth, the first is clearly to the advantage of pensioners for their incomes will rise in conjunction with the working force. However, there is no guarantee that this will always be the case as, in periods of deflation or recession, standard-of-living adjustments may even have a negative impact. To simplify, it is not self-evident that the change which is contested will adversely affect the complainants and it is by no means inconceivable that they will, in fact, receive better pensions under the amended article than they would have had under the old one. The Tribunal does not have to decide whether the periodic adjustment of pensions should be viewed as an acquired right. Even assuming that it were, such a right could go no further than the maintenance of the purchasing power of the pension paid at the time of entitlement and that is precisely what the amended article seeks to do. To accept that pensions must always be adjusted to keep in line with post-retirement salary increases would be to expose pension funds to an uncertain and unmeasurable future liability which might well in the end wipe out the funds themselves.

17. The Tribunal concludes that the complainants have not established that the application of amended Article 36 to them would result in a breach of their acquired rights and their complaints must, in consequence, be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet
CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Morcos

Judgment No. 2090

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Magdi Louis Morcos against the International Federation of Red Cross and Red Crescent Societies (hereinafter "the Federation") on 28 December 2000, the Federation's reply of 14 February 2001, the complainant's rejoinder of 23 May and the Federation's surrejoinder of 29 June 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who has both British and Egyptian nationalities, was born in 1938. Between 1995 and 1998 he served the Asian Development Bank as Controller, in the Philippines. He joined the Federation on 19 October 1998 as Under-Secretary General for Finance and Administration on a fixed-term appointment for five years. At the end of 1999 he applied for the post of Secretary General, but was unsuccessful despite being placed on the short list.

On 8 May 2000 the new Secretary General met with the complainant and the two other Under-Secretaries General and informed them that their posts in their present form were to be abolished in the restructuring of the Secretariat. The complainant's two colleagues would be reassigned as

Division Directors, one for Monitoring and Evaluation and the other for Advocacy and Communication. In a letter of 12 May the Secretary General told the complainant that his duties, along with certain other functions, would be transferred to the new post of Director of the Division of Corporate Services (as it later became). Although it was within his power to terminate the complainant's appointment under Article 1010.1 of the Staff Regulations, he deemed it more appropriate to apply Article 1030 and make the complainant's position redundant. Although Article 1030.1 specifies that in the event of redundancy a staff member is to be offered a transfer to another post, if a suitable opening is available, he was not yet in a position to see if there was such an opening in the Secretariat in Geneva. Lastly, he said that the letter constituted notice under Article 1030.3.

As from 15 May 2000 the complainant took sick leave. By a letter of 2 June he informed the Secretary General that the shock of learning that his post was to be abolished had made him temporarily unfit for work. In his submission the notice served in the letter of 12 May was invalid, having reached him on 16 May while he was on sick leave. The Secretary General replied on 15 June that the validity of the notice was being looked into. By a letter of 18 August the Director of the Human Resources Department informed the complainant that his position would be abolished as from 30 September 2000 and that, unless suitable alternative employment was found for him before then, his contract would end on 30 November 2000. In accordance with Article 1030.4 of the Staff Regulations, he would be paid an indemnity in the form of a lump sum equal to two months' base salary.

While the complainant was on sick leave the Federation contemplated transfers for him to Abidjan or Delhi, but neither materialised. On 11 September 2000 the Secretary General had a talk with him during which he told him that he was released from his duties and that he would stop coming to work. He confirmed that in a letter of 12 September.

On 2 October the complainant appealed to the Joint Appeals Commission claiming the quashing of the decision of 18 August and a transfer to the post of Director of Corporate Services. On 29 November he submitted a medical certificate for the period from 14 November 2000

to 28 February 2001. By a letter of 11 December 2000 the Co-Chairmen of the Commission informed the complainant of the Secretary General's decision to endorse the Commission's recommendation to reject his appeal. That is the impugned decision. In answer to a request for further clarification from the complainant, on 21 December 2000 the Co-Chairmen confirmed that the decision of 11 December 2000 was "final", adding that they were not in a position to provide him with any further documentation about his appeal.

B. The complainant questions the validity of Article 1010.1 of the Staff Regulations under which fixed-term contracts may be terminated by either party "giving one month's notice per each year of service, with a maximum notice of six months". He is surprised, he says, that fixed-term appointments can be terminated in the absence of a just cause or mutual agreement. He points out that he was living in the Philippines when he got the Federation's offer of employment, and would certainly have turned it down had he not been assured of a five-year contract. The fact that his contract referred to the Staff Regulations in his view affords insufficient grounds for putting an end to his appointment before its term.

According to Article 1030.1: "A redundancy can occur due to reduced activities as well as for cases when qualifications to handle the job have changed and a staff member with a different background is required." The complainant alleges that neither contingency applies to his case. The duties that went with his post were not abolished but transferred to another position, so there was no reduction of his activities. As to the duties of the Director of Corporate Services, they differ slightly from those of the Under-Secretary General for Finance and Administration, but fall squarely within the complainant's field of experience. Besides, having been found eligible for the post of Secretary General he was bound to be qualified for the post of Director of Corporate Services. He adds that the person appointed to the latter post appears not to have the relevant qualifications in the field of finance. Moreover, the post was the only one not to be advertised, in breach of Article 210.5 of the Staff Regulations. In his submission the argument that he had become redundant was "pure invention", reflecting the Secretary General's wish to replace him with a younger person.

He alleges that the decision to terminate his services is unlawful. In his view Article 1030.1 says that a staff member whose position becomes redundant must be transferred to another post, as was done in the case of the other two Under-Secretaries General. The complainant has the qualifications for the post of Director of Corporate Services and so should have been transferred to it. It is a general principle of law that the same form and conditions are required to undo as to do an act. The termination of his appointment should therefore have had the approval of the Governing Board, because Article 13(1)(m) of the Federation's Constitution subjects the appointment of Under-Secretaries General to the Board's approval.

He observes that his request for the report of the Joint Appeals Commission has been refused.

As a preliminary claim, he asks the Tribunal to order the production of that report. As substantive claims, he seeks the quashing of the impugned decision, a transfer to the position of Director of Corporate Services as from 1 October 2000 or the payment of his salary, allowances and all benefits to which he would have been entitled under his five-year contract. He also claims moral damages and costs.

C. The Federation replies that the validity of Article 1010.1 of the Staff Regulations cannot be disputed, the meaning of the text being quite plain. The complainant could not have misunderstood, as the conditions of employment which he signed refer expressly to the Regulations, which are quite clear as to the termination of fixed-term appointments. He could not expect a guarantee of employment for five years. Besides, his plea is immaterial because his separation was not based on Article 1010.1.

In the Federation's view the complainant is objecting not to the abolition of his post but to the fact that he was not made Director of Corporate Services. The issue is therefore one of selection, over which the Federation has broad discretion. The latter's approach to restructuring was "professional" and sought to optimise the reorganisation process and to appoint the best candidates to vacant posts. The position of Director of Corporate Services was advertised, so all staff were able to apply for it. The profile of the successful applicant is very different from the

complainant's. Being on the short list for the post of Secretary General does not guarantee eligibility for that of Director of Corporate Services; indeed the complainant lacked the necessary qualifications for the latter. The Federation treated him with all due consideration and respect, and had not sought to replace him with a younger person.

Lastly, the Federation points out that the complainant does not claim that there were any suitable posts at headquarters. It did its utmost to transfer him to Abidjan and Delhi, but was unsuccessful. Instead, it has paid him the indemnity prescribed in Article 1030.4 of the Staff Regulations. It adds that the Governing Board must approve the appointment of Under-Secretaries General, but, according to the Staff Rules, need only be informed about the termination of such appointments.

The Federation attaches the report of the Joint Appeals Commission to its reply. It applies for hearings of the Secretary General and the complainant. It claims costs.

D. In his rejoinder the complainant contends that the internal appeal procedure was flawed because he was not present when the Secretary General was heard. He was thus denied the chance to prove to the Joint Appeals Committee that he did qualify for the post of Director of Corporate Services. The Federation has not denied that his performance was highly satisfactory. Neither the Commission nor the Secretary General have told him what qualifications he lacks. He therefore concludes that the need to abolish his post has not been proved.

The complainant points out that he signed his contract without having received the Staff Rules. In his submission the term "fixed-term contract" is devoid of meaning if such contracts can be cancelled at short notice. The Federation should have made a point of informing him that the expiry date of his contract was meaningless. He denies that he was treated with all due consideration and respect, pointing out that he was "expulsed" from his office. He adds that there were at least two posts at headquarters to which he could have been transferred.

Lastly, he was on sick leave from 14 November 2000 and according to the Staff Regulations the notice of termination should therefore have

been suspended. That would have made the expiry date of his appointment 1 March 2001.

Although ready to appear personally before the Tribunal, he fears that it might serve no useful purpose.

E. In its surrejoinder the Federation denies that the appeal procedure was flawed. It also denies forcing the complainant to leave and asserts that he had received a copy of the Staff Regulations at the latest by the time he signed the copy of his contract in July 1998. His incapacity to work as from 14 November 2000 in no way prolongs his employment relationship: he is confusing the period of his employment with the period during which he was covered by loss of salary insurance, which continued after 30 November 2000. He has received all payments due. The Federation presses its claims.

CONSIDERATIONS

1. The complainant joined the Federation on 19 October 1998 as Under-Secretary General for Finance and Administration on a five-year fixed-term contract. In October 1999 the Federation appointed a new Secretary General, who, in the interests of greater efficiency, proposed a thoroughgoing reform of the Secretariat the essentials of which were approved on 3 May 2000 by the Governing Board. The reform involved abolishing the posts of Under-Secretaries General and setting up new divisions, among which was the Division of Corporate Services, which made the complainant's post redundant.

Following discussions on 8 and 9 May 2000, the Secretary General wrote to the complainant on 12 May confirming that his position was to be made redundant and that the duties that went with it, as well as certain other duties, would be absorbed into the recently created post of Director of Corporate Services. He informed the complainant that, although Article 1010.1 of the Staff Regulations allowed him to terminate any fixed-term contract before its expiry subject to a notice period of one month per year of service, he deemed it more appropriate to apply Article 1030, relating to redundancy under which a staff member "whose

position has become redundant shall be offered transfer to another post ... if a suitable opening is available". However, he was not yet in a position to know whether a suitable vacancy was available in the Geneva Secretariat. The complainant received that letter on 16 May while he was on sick leave, and for that reason did not regard the notice of termination that he was given as valid. After some hesitation the Federation sent him a further notification in a letter of 18 August 2000, in which the Director of the Human Resources Department confirmed that his position was made redundant, but as from 30 September 2000. She said that unless a suitable position became available in the newly structured Secretariat or in the field before that date, his appointment would end on 30 November 2000 pursuant to Article 1030.3 of the Staff Regulations. In that case he would receive a lump sum equal to two months' base salary, in accordance with Article 1030.4 of the Staff Regulations.

2. On 2 October the complainant appealed to the Joint Appeals Commission. After hearing the Secretary General the Commission found no reason to revoke the decision of 18 August 2000 nor to allow the complainant's claims to a transfer to the position of Director of Corporate Services or to payment of his salary and allowances in full until his contract expired. It also dismissed his claims to moral damages and costs. The complainant was informed on 11 and 21 December 2000 that the Secretary General had decided to endorse the Commission's conclusions and that the decision was to be regarded as "final" within the meaning of Article 1420.7 of the Staff Regulations.

3. The complainant makes the same claims to the Tribunal in addition to seeking the quashing of that decision. As a preliminary claim he seeks the disclosure of the Commission's report, which, without proffering any explanation, the latter had unlawfully failed to send him. The Federation produces the report as an attachment to its reply. The preliminary claim therefore no longer shows any cause of action, though it is surprising that the Federation initially refused what was a legitimate request on the complainant's part. The report shows that the Commission heard the Secretary General on 30 October 2000, but did not hear the

complainant or give him access to the Secretary General's observations. That is an inadmissible breach of the rule that both parties must be heard.

4. On the merits the complainant asserts that the decision to terminate his appointment is unlawful. His contract stipulated that he was to be appointed for five years and the Federation could not rely on Article 1010.1 of the Staff Regulations. Nor could it rely on Article 1030.1, which is about redundancies. Even if the latter did apply to his case, it would mean appointing him by transfer to the new post of Director of Corporate Services. In any event, in his view, the decision to end his appointment as Under-Secretary General should have been submitted to the Governing Board in accordance with Article 13(1)(m) of the Constitution.

5. With regard to the complainant's first plea, the Tribunal observes that, even though the Federation based its decision of 18 August 2000 on Article 1030, concerning redundancies, it made the point in its letter of 12 May 2000 and again in its brief to the Tribunal that Article 1010.1 allows it to terminate an appointment by giving one month's notice per year of service. In its surrejoinder it adds that 1010.1 is clear, leaves no doubt as to interpretation and "will have to be applied as it is by the Tribunal". Article 1010.1 says:

"Contracts with fixed terms normally come to an end latest at the date stated therein. However, such contracts may be terminated at any time by either party giving one month's notice per each year of service, with a maximum notice of six months, to take effect at the end of the appropriate month."

The Tribunal observes that, contrary to what the Federation appears to state in some parts of its submissions, 1010.1 may not be interpreted as authorising it to terminate such contracts arbitrarily. Decisions of this kind must be based on unsatisfactory performance, or the interests of the service. Furthermore, there must be no breach of adversarial procedure nor any error of fact or of law, nor abuse of authority, nor obvious misappraisal of the facts. In its decision of 18 August 2000 the Federation opted to apply to the complainant not Article 1010.1 but Article 1030 on redundancy. The validity of the complainant's arguments must therefore be assessed in the light of 1030.

6. With regard to the complainant's second plea, the Tribunal accepts the Federation's assertion that the post of Under-Secretary General for Finance and Administration had to be abolished as part of the restructuring of the Secretariat. Admittedly, Article 1030.1 does not provide for exactly such a case as this, but states that: "A redundancy can occur due to reduced activities as well as for cases when qualifications to handle the job have changed and a staff member with a different background is required." However, there is obviously nothing unlawful about restructuring *per se* and it will always mean regrouping duties and sacrificing posts.

7. But in carrying out such an exercise, an organisation has a duty to observe the rights and safeguards of its staff. To take up his post with the Federation the complainant left a job with the Asian Development Bank in Manila on the strength of a five-year contract, only to have his post abolished nineteen months later. Bearing that in mind, the Federation's first duty in addressing the consequences of his redundancy was to offer him a transfer to another suitable post. Only if that proved impossible should it apply Article 1030.4 of the Staff Regulations. But there is no evidence that the Federation did its utmost to find him a post which matched his skills and level of responsibility. The Secretary General had told him on 12 May that he did not yet know of a suitable post for him in Geneva and that his duties had been incorporated in the new post of Director of Corporate Services. The Federation never offered to transfer him to that post. And though it did envisage sending him to Abidjan and Delhi, it is plain on the evidence that the complainant stood not the slightest chance of being selected for either post. The procedure to recruit a Head of Regional Delegation for West Africa, in Abidjan, had closed by mid-April 2000, in other words before the complainant's post was abolished, and had led to a candidate being chosen. And although the Federation consulted the National Societies concerned about appointing the complainant, they naturally objected, "both on substantive and procedural grounds", the selection already having taken place, as the Secretary General told the complainant on 12 July 2000. As to the post of Head of Regional Delegation in Delhi, although the complainant applied he was not selected and was so informed on 28 September 2000.

8. The Federation enlisted the services of an outside company to recruit for some of the posts created under the restructuring, but no offer seems to have been made to the complainant. The dossier shows that the Federation failed to do its utmost to reassign, by way of a transfer, an official with a good record whose post had been abolished: it thus failed in its duty to observe the Staff Regulations and to respect the complainant's dignity. The conclusion is that the decision of 18 August 2000, confirmed on 11 December 2000, must be set aside. The Tribunal need not entertain the complainant's pleas that he applied for the post of Secretary General at the same time as the candidate who was appointed to that post and who subsequently took the decision to terminate his appointment, and that the Governing Board should have been consulted before his post was abolished.

9. The Tribunal will not order the complainant's appointment to the post of Director of Corporate Services, since that would be to encroach on the discretionary authority conferred on heads of international organisations, and to reinstate him would be inappropriate. But it will allow his claim to payment of the salary, allowances and all benefits to which he would have been entitled had he stayed in the organisation until 18 October 2003, when his contract was due to expire. The Federation may deduct from the above the sums it has paid pursuant to its decision of 18 August 2000 for the period after 30 November 2000, and the amount the complainant has received in loss of earnings from the Federation's insurance system, and any professional earnings he may have received.

10. The complainant claims moral damages. In the light of all the circumstances of the case, the Tribunal will allow the claim and sets the amount *ex aequo et bono* at 10,000 Swiss francs.

11. Since he succeeds, the complainant is entitled to costs, and the Tribunal awards him 10,000 francs.

12. That being so, the Federation's claim for hearings fails as does its counterclaim to costs.

DECISION

For the above reasons,

1. The decision of the Secretary General of the Federation taken on 18 August 2000 and confirmed on 11 December 2000 is set aside.
2. The Federation shall pay the complainant compensation to be calculated in accordance with 9 above, and moral damages in an amount of 10,000 Swiss francs.
3. The Federation shall pay the complainant 10,000 francs in costs.
4. The complainant's other claims are dismissed.
5. The Federation's counterclaim is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

NINETY-SECOND SESSION

In re Kretschmer

Judgment No. 2091

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Gerhard Paul Kretschmer against the European Southern Observatory (ESO) on 13 October 2000 and corrected on 12 January 2001, the ESO's reply of 5 March, the complainant's rejoinder of 11 June, and the Observatory's surrejoinder of 5 July 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under an agreement concluded in 1968 between the ESO and the European Organization for Nuclear Research (CERN), as revised in 1983 and again in 1991, the staff of the ESO are participants in the Pension Fund of CERN.

The complainant, a German national born in 1951, was employed as a mechanical engineer on a three-year contract with the ESO which commenced on 1 May 1994. He was assigned to the Paranal Observatory in the Chilean Andes. On 25 October 1996 his contract was extended until 30 April 1998. On 14 October 1997 he had an accident while on duty.

fracturing his right wrist and bruising his left knee. Having obtained the prior consent of the ESO Administration, he returned to Germany on 20 October for a convalescence period. On 28 October the complainant was informed by a letter from an official in Personnel Services that his contract would not be renewed upon its expiry on 30 April 1998.

While on his way to a medical appointment on 23 December 1997 the complainant had a second accident. On 19 January 1998 his doctor transmitted a medical report to the ESO medical adviser and Van Breda (the ESO's insurance brokers), stating that the complainant had "a long-term inability to resume work", that he may need surgery and that the second accident was essentially a direct result of the first one. On 1 April 1998 his doctor issued a second medical report, estimating the complainant's disability at 40 per cent according to the applicable German standards. On 18 April the complainant informed the ESO Personnel Services of the content of the medical report and requested that his case be submitted to the Rehabilitation Board.

In its report dated 13 November 1998 the Board considered that the complainant should be compensated for the consequences of his accident. It recommended, in particular, that in the event retraining the complainant for another type of work did not prove feasible, then a review of the non-extension of his contract should take place with the purpose of implying dismissal for medical reasons so that a total incapacity pension would be payable to him under the CERN Pension Fund. By a letter of 9 April 1999 the Head of Administration informed the complainant, on the Director General's behalf, that the ESO had concluded that it was the CERN Pension Fund that should determine if and to what extent he would be entitled to an incapacity pension. Having received a draft of this letter, the Administrator of the CERN Pension Fund informed the Head of Administration at the ESO the same day that the conditions set by the Rules of the Fund for providing the complainant with an incapacity pension were not met unless the ESO changed the reason for his termination to that of medically confirmed incapacity.

The complainant appealed against the decision of 9 April to the Joint Advisory Appeals Board. In a report dated 26 November 1999 the Board recommended, *inter alia*, that the reason for the complainant's termination

be changed to dismissal for medical reasons and that the ESO actively support the complainant in obtaining an incapacity pension from the CERN Pension Fund. On 25 January 2000 the complainant was informed that the Director General's decision of 9 April 1999 was maintained.

On 19 April 2000 the three parties signed the following Settlement agreement:

"In order to solve the issue of the payment of an incapacity pension by the Pension Fund of the European Organization for Nuclear Research (CERN) to [the complainant], former staff member of the European Southern Observatory (ESO), victim of a professional accident in the course of his contract with ESO, and whose contract expired on 30 April 1998,

CERN, ESO and [the complainant] agree on the following settlement:

1. ESO, with effect from 1st May 1998, replaces the reason of termination of [the complainant's] contract by a dismissal owing to disability confirmed by a medical certificate ...
2. As [the complainant's] state of health was confirmed to be consolidated and the degree of his incapacity fixed at 100% on 19 December 1999 only, the CERN Pension Fund will pay retroactively, as from 1st December 1999, to [the complainant] a total incapacity pension following chapter II, section 3, of the Rules of the CERN Pension Fund, plus allowances.
3. [The complainant] is entitled to keep the unemployment benefits paid by ESO.
4. Within three months (starting date 1st May 2000), ESO takes the necessary measures to allow [the complainant] to be insured with the ESO health insurance company, van BREDA.
5. [The complainant] accepts this solution as a final settlement of his rights towards ESO and the CERN Pension Fund and renounces any further claims towards ESO and the CERN Pension Fund in connection with the termination of his contract with ESO and his state of health.

This settlement takes effect with the signature of the three parties involved."

The Head of Administration wrote to the complainant on 11 May 2000 offering him an arrangement in compliance with paragraph 4 of the Settlement and in accordance with Title I, Article 5 B 3 of the ESO Group Insurance Contract so that he would benefit from medical coverage against payment of a premium. The premium would need to be paid in one lump sum in advance for six months, and certain coverage would be excluded. A copy of the Group Insurance Contract was attached and the complainant was asked to inform the Administration whether he would accept the offer. He replied on 22 May that, according to Title I, Article 3, paragraphs 5 and 6, and Title III, Article 14 of the Group Insurance Contract, as long

as he benefits from a total incapacity pension he should be exempted from payment of any premiums and all previous guarantees should continue to apply; he asked that such coverage be secured for him by the ESO. He attached to his reply a copy of a letter from Van Breda to the Head of Administration at the ESO, dated 16 July 1998, in which it asked to be kept informed about any decisions by the CERN Pension Fund since Article 14 might become applicable to the complainant's case. On 2 June 2000 the Head of the Personnel Department informed the complainant that Title III, Article 14 concerns only those members of the personnel who, on the date on which their pension takes effect, are insured with Van Breda and thus cannot be applied to the complainant. The offer of 11 May 2000 was maintained.

In a letter of 10 July 2000 the complainant appealed to the Director General against the decision to refuse him the premium waiver. On 19 July the Head of Administration replied to the complainant on the Director General's behalf, expressing serious doubts as to the receivability of the appeal, as the complainant was no longer a staff member, and that the Administration did not believe that an internal appeal procedure was the appropriate way to handle his request. That is the impugned decision.

B. The complainant challenges the lawfulness of the decision of 19 July 2000. He considers that the ESO is attempting to escape from its obligations.

He argues first that the impugned decision is based on an error of law. The condition in paragraph 4 of the Settlement agreement – "to allow [the complainant] to be insured" – must be construed as to "allow [the complainant] to be insured according to the relevant applicable rules". The relevant rules are those found in Addendum 1 (concerning accidents on duty and occupational illnesses) to the Group Insurance Contract, since it cannot be contested that the complainant's state of health has been caused by an accident while on duty.

Secondly, the impugned decision is in breach of the principle of good faith. The Observatory's position constitutes an attempt to prevent him from benefiting from that which he is legally entitled following recognition of his disability.

The complainant says that he has suffered financial and moral injury through the ESO's actions. He has also been placed in an uncertain situation, as there is no guarantee under Title I, Article 5 B 3 of the Group Insurance Contract that his coverage will continue as long as he receives an incapacity pension. There is such a guarantee under Article 3 B 3 of Addendum 1.

He asks the Tribunal to quash the Director General's decision of 19 July 2000 and to order the Observatory to take the necessary measures to provide him and his family with health insurance coverage, to be continuous and free of premium during the period for which he is awarded a disability pension and, once he is in receipt of a retirement pension, at the cost which Van Breda guarantees to former ESO employees covered by its insurance until the age of retirement. He also requests the Tribunal to award him moral damages and costs.

C. In its reply the Observatory contends that the only question in dispute is whether the Settlement agreement obliges the ESO to provide the complainant with free health insurance through Van Breda. Pursuant to the Settlement, the Observatory contacted Van Breda which consented to a special arrangement for him under Article 5 B 3 of the ESO's Group Insurance Contract. The complainant rejected the offer. Van Breda did not consent to a premium waiver because the complainant was not insured under the Group Insurance Contract at the date on which the pension took effect.

The Observatory argues that the complaint is not receivable because the complainant is neither alleging non-observance of the terms of his contract nor of the provisions of the ESO International Staff Rules and Staff Regulations. His claims are based on a trilateral agreement concluded between himself, the ESO and the CERN Pension Fund, and the Tribunal has no jurisdiction over this matter. However, in the event that the Tribunal considers itself competent to adjudicate the dispute, the complainant's claim of being awarded, upon reaching the age of retirement, health insurance under the same conditions as retired ESO staff members is an entirely new claim which was not raised in the internal appeals procedure.

The Settlement concluded between the three parties does not establish an obligation for the ESO to provide the complainant with the benefits he seeks. The text of paragraph 4 of the Settlement neither obliges the ESO to be successful with its effort to provide the complainant with health insurance nor does it define the financial conditions under which the insurance should be placed. In any event, paragraph 5 provides that the Settlement is final and that the complainant expressly renounces any further claims against the ESO. The Observatory points out that the complainant had been assisted by his legal adviser during negotiations, who found the text to be clear and without flaws.

D. In his rejoinder the complainant contests the Observatory's arguments on the receivability of his complaint and submits that it falls within the scope of Article II of the Tribunal's Statute. Furthermore, he contends that the claim for relief which the ESO contests derives directly from the requests made in his letter of 22 May 2000 to the Head of Administration and that his appeal was lodged against the decision of 2 June in response to his requests.

The complainant contends that the Observatory has tried to mislead the Tribunal by stating that paragraph 4 of the Settlement does not define the financial conditions under which the insurance would be placed. Van Breda is specified in the paragraph and therefore "the provisions to apply are clearly those contained in ESO Group Insurance Contract with Van Breda and its Addendum 1". Paragraph 1 of the Settlement replaced the reason for the complainant's termination by a dismissal for disability, as from 1 May 1998. Thus, the complainant never ceased to be ensured according to Article 2 A Category 1 of Addendum 1 of the Group Insurance Contract, which provides that "members of personnel who are affiliated to the CERN Pension Fund are covered for Medical Expenses resulting from accidents on duty or occupational illnesses and benefit from the continuation of guarantees, stipulated in Article 3.B.3 of this addendum". Any argument to the contrary would constitute another attempt by the Observatory to escape its responsibility and shift the burden of responsibility to another body. It is the ESO and not the complainant who should bear the consequences of the mistakes made in this case.

E. In its surrejoinder the ESO states that it has not tried to mislead the Tribunal: it simply does not share the complainant's view of the facts and the law. It points out that the complainant has not been without health insurance, as he has been insured under that of his wife.

The complainant did not appeal the decisions taken by the ESO prior to the trilateral agreement, so the Settlement constitutes the only legal basis on which the complainant may base a claim against the Observatory. As this agreement involves neither the non-observance of his terms of appointment nor that of the Staff Regulations, the ESO presses its argument that the complaint is not receivable. The complainant's interpretation of paragraph 1 of the Settlement does not correspond to the principles of good faith governing the interpretation of contracts. Since the Settlement awarded the complainant the incapacity pension retroactively as from 1 December 1999, at the time he signed it he was in fact and in law not affiliated to the ESO health insurance.

CONSIDERATIONS

1. The complainant was employed as a mechanical engineer at the ESO's Paranal Observatory in Chile on a three-year fixed-term contract from 1 May 1994 to 30 April 1997; his contract was later extended to 30 April 1998.

2. On 14 October 1997 he suffered an accident while on duty at the Paranal site. He returned to Germany for a convalescence period and he suffered a second accident on 23 December 1997. The non-renewal of the complainant's contract, which ended on 30 April 1998, was not appealed and he was paid end of service grants. Under the ESO Staff Regulations he was entitled to unemployment benefits for a maximum of fifty weeks and also to be affiliated to the ESO's health insurance scheme administered by the insurance brokers Van Breda, with the Observatory paying total contributions.

3. Exceptionally, his entitlement to unemployment benefits and free health insurance coverage was extended for three months to 15 July 1999

as no decision had been taken regarding the complainant's entitlement to an incapacity pension from the CERN Pension Fund.

4. On 15 July 1999 the complainant's unemployment benefits ceased. On 1 July 1999 he had been offered continued health insurance coverage for nine months at his own expense, but he refused this.

5. Meanwhile, at the request of the complainant, a Rehabilitation Board had been constituted on 15 June 1998. In its report dated 13 November 1998, the Board recommended that, if retraining the complainant for other work was not feasible, then a review of the non-extension of the complainant's contract should take place with the purpose of implying dismissal for medical reasons, if this would allow a total incapacity pension to be paid by the CERN Pension Fund.

6. In a letter of 9 April 1999 the complainant was informed by the Head of Administration that the Director General had decided against reviewing the decision of 28 October 1997 not to renew the complainant's contract and decided that the CERN Pension Fund should determine if and to what extent the complainant would be entitled to an incapacity pension. That decision was appealed on 2 June 1999 and the Joint Advisory Appeals Board recommended on 26 November 1999 that the ESO should review the reasons for non-extension of his contract and actively support the complainant's application to obtain an incapacity pension. The Director General decided on 25 January 2000 to maintain that decision.

7. Negotiations between the complainant, the CERN Pension Fund and the Observatory led to the conclusion of a Settlement which was signed by the three parties on 19 April 2000. (The terms of this Settlement are set out in A.) The complainant was advised throughout the negotiations by the lawyer representing him in this complaint.

8. Pursuant to the Settlement the Observatory contacted Van Breda regarding insurance coverage for the complainant. Van Breda consented

to a special arrangement to insure the complainant against a premium of 10.8 per cent of his last monthly basic salary. Van Breda did not consent to a premium waiver since the complainant was not insured under the ESO Group Insurance Contract at the date on which the pension took effect.

9. In a letter of 22 May 2000 the complainant contended that he should be exempt from paying a premium as long as he was benefiting from an incapacity pension; he asked the ESO to secure such coverage from Van Breda. The Observatory explained in a letter of 2 June 2000 why he could only be insured under the conditions mentioned. The complainant appealed on 10 July 2000 to the Director General. In a letter of 19 July 2000 the Head of Administration replied on the Director General's behalf, expressing doubts as to the receivability of the appeal as the complainant was no longer a staff member, and because the subject matter referred to the interpretation of a trilateral agreement between the complainant, the ESO and the CERN Pension Fund. That is the decision impugned.

10. The ESO submits the complaint is not receivable as it does not allege non-observance of the terms of the complainant's appointment or of the ESO's rules and regulations. It also contends that the Settlement solved the conflict between the three parties concerning the issue of the incapacity pension.

11. The complainant argues that if the Observatory cannot reach an agreement with Van Breda to provide insurance for him, then the ESO would have to substitute itself for Van Breda and comply with all the obligations which would have been those of Van Breda. He claims for himself and his family, health insurance coverage which is continuous and free of premiums during the period for which he is awarded a disability pension and upon reaching the age of retirement, health insurance coverage under the same conditions as other retired staff members. He also claims damages and costs.

12. In the first place, the Tribunal considers that since the Settlement between the complainant, the ESO and the CERN Pension Fund arises out of the complainant's rights under his contract of employment as well as the Staff Rules and Regulations, it has jurisdiction to consider the effect of the trilateral agreement.

13. As the Tribunal has stated on other occasions, the settlement of disputes is to be encouraged and supported. This means that the parties themselves decide the conditions under which they are willing to put an end to their differences. The settlement reached in this case, which did not involve Van Breda, secured payment of a total incapacity pension to the complainant. In order to achieve this result the ESO agreed, with effect from 1 May 1998, to replace the reason of termination of the complainant's contract by a dismissal owing to disability. The CERN Pension Fund agreed to pay the complainant a total incapacity pension as from 1 December 1999. The Observatory also agreed, within three months from 1 May 2000, to take "the necessary measures to allow [the complainant] to be insured with the ESO health insurance company, van BREDA".

14. The complainant is thus considered as having been dismissed because he was disabled and he receives a pension on that basis. According to the terms of Article 3 B 3 of Addendum 1 to the Group Insurance Contract, persons receiving a permanent disability pension benefit from a waiver of premiums. The terms of the Settlement have certain consequences: one of which is that the complainant, who is in no way responsible for any delay there may have been in reaching that Settlement, is entitled to benefit from the provisions of the Group Insurance Contract and its Addendum that are relevant to permanent disability. If the insurer, who is not a party to the Settlement, requires payment of a premium to achieve that result, then such payment is a "necessary measure" for obtaining health insurance cover which must be fulfilled by the Observatory. The Tribunal will so order.

DECISION

For the above reasons,

1. The complaint is allowed and the ESO is ordered to take the necessary measures, including payment of premium, to obtain health insurance coverage for the complainant.
2. The complainant is entitled to costs in the amount of 4,000 euros.
3. The other claims are dismissed.

DISSENTING OPINION BY JUSTICE CARROLL

1. I regret that I cannot agree with the view of my colleagues in this matter.

2. Where a settlement of a dispute is agreed upon, it is up to the parties concerned to define with sufficient detail the terms of the settlement. The Tribunal cannot step in to supply any missing provisions.

3. Van Breda was not a party to the Settlement in question. The Settlement does not mention what would happen if Van Breda refused to insure the complainant; there was equally no mention of the payment or the non-payment of a premium. What the Observatory agreed to do was to take the necessary measures "to allow" the complainant "to be insured" with Van Breda.

4. The Observatory did not agree "to insure" the complainant, which would imply a direct responsibility, but used the passive form "to allow ... to be insured". It would have been simple to provide a term agreeing to insure the complainant at no cost to him if that was what was intended.

5. Where, in an agreement, the parties omit terms which, if they had adverted to the situation at the time, they would certainly have inserted to complete the contract, then a case can be made for implying that such terms are necessary to achieve that result. This does not mean that a term

should be implied merely because it would be reasonable to do so or because it would make the performance of the contract more convenient. The test is necessity, not reasonableness. It is not for the Tribunal to consider it reasonable that the Observatory should pay the premium.

6. In my view it cannot be stated that the Observatory would certainly have agreed, if its attention had been drawn to it at the time, to pay the entire premium if Van Breda demanded it. On 1 July 1999 the ESO had offered continued health insurance at the complainant's own expense, which he refused. Why would the Observatory have taken on an unquantified liability with regard to insurance premiums without a specific provision to that effect? The purpose of the Settlement, as stated in the preamble, was to solve the issue of the payment of an incapacity pension. The terms "to allow" the complainant "to be insured" appear to be very much an addendum.

7. It may well be that the parties assumed no premium would be payable. But whatever the explanation, the Observatory took such steps as were necessary to allow the complainant to be insured. The fact that Van Breda required a premium which the Observatory had not agreed to pay, meant that an eventuality happened which was not provided for in the contract.

8. In my opinion the Observatory fulfilled its part of the bargain.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Spaans

Judgment No. 2092

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Yolanda Margaretha Elisabeth Spaans against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 30 October 2000 and corrected on 7 December 2000, the OPCW's reply of 16 January 2001, the complainant's rejoinder of 26 March and the Organisation's surrejoinder of 4 July 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1966 and is of Dutch nationality. She was employed by the Preparatory Commission for the OPCW from May 1994 as a travel clerk at grade GS-4. Her appointment was renewed several times up to 23 May 1997 when the Preparatory Commission ceased to exist and its functions were transferred to the OPCW. From 24 May the Organisation appointed the complainant as a travel clerk on a three-year contract and from 25 June 1997 it appointed her as a travel assistant in the General Services Branch on a three-year contract at grade GS-6. During a restructuring process in 1998 the branch was renamed the Procurement and Support Services Branch (PSB) and her title became Support Services Assistant.

From October to December 1998 the complainant was on sick leave. She resumed work in January 1999, working part-time for several weeks. In July the Organisation transferred her with her GS-6 post to the International Cooperation and Assistance Division. She continued to perform some of her previous duties. Subsequent to a recommendation of the Contract Renewal Board, the Director-General informed the complainant on 6 October that he had decided not to offer her a further contract when her existing one expired in June 2000, as in view of the restructuring of the Procurement and Support Services Branch he intended abolishing the post of Support Services Assistant.

The complainant wrote to the Director-General on 2 December 1999 requesting a review of that decision. She noted that the Director-General had not yet decided to abolish her post, but that it was however his "intention" to do so. By a letter dated 14 December the Director-General maintained his decision. She appealed against it on 13 January 2000.

The Appeals Council reported on 27 July 2000. The panel found that her right to due process had been violated and recommended reinstating her in her post. In the event of her post having effectively been abolished and no other suitable ones being available, it recommended that she be paid compensation equal to twelve months' net base salary and that she be considered for future vacancies for which she is qualified. In a dissenting opinion accompanying the report a member of the panel recommended that the complainant be paid twenty-four months' net base salary. The Director-General did not concur with the Council's conclusions or its recommendations. He informed the complainant of this in a letter of 3 August 2000. That is the decision she impugns.

B. The complainant submits that, according to the case law of the Tribunal, the Organisation does not have total freedom with regard to non-renewal of a fixed-term contract: its discretionary power is limited and the administrative decision it takes is subject to review by the Tribunal. She claims that the reasons for not renewing a contract should be given in the notice of non-renewal and may not be added to later. The only reason given in the Director-General's letter of 6 October 1999 was his alleged intention to abolish her position, but a mere intention to abolish a post

does not justify a non-renewal of contract. Moreover, the burden of proof lies with the Organisation: it has to show that the complainant's post was in fact abolished. She argues that a new staff member, Ms V., recruited externally, was put on her post. The official in question was appointed as a "Senior Support Services Clerk" on 28 September 1999 at GS-5 level and was promoted to level GS-6 as "Support Services Assistant" on 26 July 2000, one month after her own employment ceased. Her post was not therefore abolished. It continued to exist in the same branch.

The complainant alleges that the real reason for non-renewal was prejudice against her on the part of officials of the Organisation, probably on account of her illness, which in her opinion was attributable to the immense workload she faced. Despite the length of notice she was given the Organisation took no steps to find her alternative employment. Furthermore, she could legitimately expect that her contract would be renewed. A new travel agency took over at OPCW in 2000: the new staff members required supervision, training and assistance and the OPCW could ill afford to lose such a crucial post as hers.

The complainant seeks (1) the quashing of the impugned decision; (2) payment, with compound interest, of all remuneration and benefits that she would have been entitled to from 25 June 2000 up to the date of this judgment; (3) the renewal of her contract and retroactive reinstatement in her post or another suitable one or, alternatively, an award of damages equal to the remuneration she would have received if her appointment had been renewed for a three-year period from 25 June 2000; (4) the "repair" of any material damage and reimbursement, with compound interest, of expenses caused by the non-renewal; (5) moral damages; and (6) costs.

C. In its reply the Organisation argues that the complaint is devoid of merit. It affirms that the Director-General's stated intention to abolish the post was carried out. Abolition of posts in the interest of the Organisation lies within the Director-General's discretionary power. The case law establishes that a decision to abolish a post may be impugned under certain conditions, none of which are present in this case. After the complainant's transfer in 1999 her original duties were divided among the staff of four

branches and following the expiration of her contract in 2000 there was a second dividing up of her functions.

It states that the allegation of personal prejudice is unfounded. The abolition of her post was in the interest of the Organisation. In discussing the complainant's case, the Contract Renewal Board concluded that the post necessitated "skills and knowledge" other than those possessed by the complainant. Nothing in the Staff Regulations obliges the OPCW to find alternative employment for staff whose contracts are not being renewed. That is why the complainant was given more than eight months' notice. In spite of that she has not sought alternative employment with the Organisation.

Her claim that she had a legitimate expectation of renewal is also unfounded: her latest letter of appointment expressly stipulated that her contract did not carry "any expectancy for extension or conversion". Moreover, she has not proved that she suffered moral injury. Legally, the Organisation could have ended her appointment upon abolition of her post, but it kept her on for the remainder of her contract.

D. In her rejoinder the complainant presses her claims for redress. Even though the complainant's previous tasks were distributed among existing staff members and the new member of staff referred to above, it is clear that the latter took over the grade and title of her post. Contrary to the requirements advocated in the case law, the assignment of her functions to other people did not result in a reduction of the number of staff, or in a reduction of costs for the Organisation. There was prejudice against her and the OPCW was simply trying to "get rid" of her.

She notes that the Contract Renewal Board was chaired by the Director-General and that its recommendation on her case does not mention abolition of post or restructuring of the Procurement and Support Services Branch, which were the reasons for non-renewal given in the letter of 6 October 1999. Furthermore, according to the case law it is the organisation's duty to find alternative employment for the staff member.

E. In its surrejoinder the Organisation takes the view that the abolition of the complainant's post was legitimate and that no single staff member

is now performing the tasks she was previously carrying out. Reduction of costs was a requirement in the Tribunal cases cited by the complainant in her rejoinder, but is not a general requirement applicable in all cases of abolition of post, and is not material in this case.

All contract renewals are subject to the Contract Renewal Board's recommendation. The fact that the Director-General chairs it does not taint its recommendation. That function has on almost all occasions been delegated to his deputy. It points out that renewals too are within the discretion of the Organisation and that her post was in fact abolished upon her transfer to the unbudgeted post in the International Cooperation and Assistance Division in July 1999. It denies that there was any prejudice against her.

CONSIDERATIONS

1. The complainant was employed by the Preparatory Commission for the OPCW from May 1994 on a fixed-term appointment, as a travel clerk, at grade GS-4. Her contract was renewed several times. In May 1997, following the creation of the OPCW, she was granted a three-year appointment. On 25 June 1997 she was promoted to grade GS-6 as a travel assistant on a three-year contract that superseded the previous one. In a restructuring process in 1998 the branch she worked in became the Procurement and Support Services Branch (PSB/ADM) and her title changed to Support Services Assistant. By oral instructions from the Human Resources Branch, she was transferred to the International Cooperation and Assistance Division on 12 July 1999.

By a letter dated 6 October 1999, the Director-General informed the complainant that her contract would not be renewed when it expired on 24 June 2000, because it was his "intention to abolish the position of Support Services Assistant in view of the restructuring of the Procurement and Support Services Branch". In a letter of 2 December 1999 to the Director-General the complainant requested review of that decision, but on 14 December 1999 the Director-General informed her that he had not found any basis for reconsidering his decision. The complainant was successful before the Appeals Council which recommended her

reinstatement in a report dated 27 July 2000, but the Director-General did not accept its recommendation and by a letter dated 3 August 2000 confirmed his initial decision. That is the impugned decision.

2. It is elementary that where a reason is given for taking a decision which is adverse to the interests of a staff member the organisation is held to that reason and cannot later seek to justify its action on other grounds. Thus, the Tribunal will give no effect to the pleas of the Organisation that the complainant's contract was not renewed because her performance had been less than superlative. The Organisation must show that the reason given, the Director-General's intention to abolish her post in view of restructuring, was a true and valid reason for the non-renewal of her contract.

3. The Organisation attempts to do this by arguing that the complainant's post was in fact abolished at the time she was transferred to the International Cooperation and Assistance Division. That cannot be right. That transfer took place in July 1999 and if it had involved the abolition of the complainant's post at that time the Director-General would not have spoken of a mere intention to abolish her post in a letter written almost three months later.

4. The complainant says that in fact her post was never abolished and that the evidence bears this out. After she was transferred she continued to perform a number of the duties which had previously been hers in the Procurement and Support Services Branch. Some of those functions remained in the Branch and were performed by Ms V. who had been recruited from outside the Organisation on 28 September 1999 and started as a "Senior Support Services Clerk" at grade GS-5. Other duties previously performed by the complainant were temporarily distributed to staff of other departments but most were absorbed back into the Branch in June 2000 after the complainant had left the Organisation.

5. Furthermore, as from 26 July 2000, only one month after the complainant had been released from service, Ms V. was promoted to grade GS-6 as "Support Services Assistant". This is exactly the same title as the

complainant had held, with the same grade and responsibilities and in the same branch. Besides which, the majority of the duties which had been performed by the complainant while she had been in the Procurement and Support Services Branch were assigned back to that department. The inference is irresistible that the complainant's post was never abolished but was simply given to another recently recruited staff member. Indeed, in an e-mail of 3 May 2000 the Director-General's Chief of Cabinet said his understanding was that "when [the complainant] goes her post ... would remain in PSB".

6. In other words, the complainant's post was and had always remained in PSB. This was the post to which Ms V. was appointed after the complainant had left. Since that post was never abolished it follows that either the Director-General never really had the intention to abolish it, or, if he did, he changed that intention at some time between the date on which he advised the complainant in October 1999 of his "intention" to abolish it and the date, in July 2000 – prior to the impugned decision – on which he appointed Ms V. to that post.

What is more, the Contract Renewal Board, upon whose advice the Organisation says the Director-General relied in deciding to abolish the complainant's post, far from recommending its abolition, instead suggested that someone with different qualifications should be appointed to it in these terms:

"In order to better serve the needs of the Organisation and to fully meet the requirements for this post in the future, skills and knowledge other than those possessed by the incumbent are needed. Renewal of the contract should therefore not be offered."

7. One of the tests which the Tribunal has developed over the years to determine whether or not a post has truly been abolished is to ask whether or not the "abolition" has resulted in a reduction of the number of staff in the affected department. (See, for example, Judgment 139, *in re Chuinard*.) If it has not, the presumption is that all that has taken place is a redistribution of functions among existing posts, a normal incident of good management, and not the abolition of one or more posts, a much more serious matter which will usually result in the loss of employment for one or more staff members. Although the complainant argues that the

restructuring led to an increased number of staff members the Organisation in its surrejoinder states that:

"While the functions (in the travel section) have been distributed among a greater number of staff involving other branches, PSB/ADM has retained the same number of budgeted posts."

8. Since the reason given by the Director-General for the decision not to renew the complainant's contract was not true, the impugned decision is based on an obvious mistake of fact; it cannot stand and must be set aside.

9. Before turning to the matter of remedy the Tribunal adds that, although the point was not taken in argument, it has some doubt as to even the formal validity of the impugned decision. The text of the Director-General's decision read as follows:

"On 27 July 2000, I received the report of the Appeals Council panel set up to hear your appeal against my decision not to renew your contract.

I am attaching a copy of the Appeals Council's report.

I do not agree with the Appeals Council's reasoning and conclusion. I therefore do not accept its recommendation.

Consequently, having considered all aspects of the report, and taking into account all the surrounding circumstances, I find no grounds for reconsidering my decision not to renew your contract."

10. When the executive head of an organisation accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. Where, however, as in this case, he rejects those recommendations his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body. As the decision must be set aside on other grounds it is not necessary to go any further into the matter, just as it is not necessary to take up any of the complainant's other pleas.

11. The Appeals Council states in paragraph 24 of its report that on the basis of the practice being established at the Organisation, contractual renewals have been issued with a duration of two years, and in exceptional cases, one year.

It appears therefore that in this case, where no abolition of post in fact took place, the complainant could not have expected renewal for more than two years.

The complainant's contract expired on 24 June 2000. The Tribunal will not order reinstatement but will order instead payment equal to all remuneration (salary and allowances) and all other benefits to which the complainant would have become entitled if her contract had been renewed to 24 June 2002, subject to her accounting for any net earnings from outside employment to the date of delivery of this judgment. She is entitled to an award of 10,000 euros in damages and to 5,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organisation shall provide the relief set out in 11 above.
3. The Organisation shall pay the complainant 10,000 euros in damages.
4. It shall pay her 5,000 euros in costs.
5. All her other claims are dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Fiala

Judgment No. 2093

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Paul Fiala against the World Health Organization (WHO) on 9 November 2000 and corrected on 8 December 2000, the WHO's reply of 14 March 2001, the complainant's rejoinder of 18 April, the Organization's surrejoinder of 20 July, the complainant's further submissions of 6 August and the WHO's observations thereon of 14 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1945 and holds French and British nationality. He entered the service of the WHO in 1981 as a messenger at grade G.2. As from 1982, he was a clerk at the same grade. After being transferred to the Division of Conference and General Services and promoted to grade G.3, he was reassigned to a post as clerk in the Records Management Section (hereinafter the "Registry") in the above Division. He was then promoted to grade G.4.

The material facts are largely the same as those set out in Judgment 2076 (*in re Trambelland*), delivered on 12 July 2001. As

indicated in that judgment, as from January 1996 the work of the Registry was reorganised. A computerised system of records management was introduced and the nature of the complainant's duties changed. A generic post description for several posts in the Registry was only finalised in 1999. In October 1999, the complainant's post of clerk was reclassified to grade G.5 and he was promoted to that grade with effect from 1 October 1999.

On 9 December 1999 the complainant appealed to the Headquarters Board of Appeal against the effective date of the reclassification of his post and hence of his promotion. He argued that he had been discharging the same duties since 1 September 1996 and that his promotion should therefore have been effective from that date.

In its report of 15 May 2000 the Board considered that the earliest date at which the Administration could have drawn up a new post description was January 1997 and, consequently, an outcome from the reclassification process could have been expected by September 1997. It recommended paying him a sum equivalent to the difference between his actual earnings for the period from 1 September 1997 to 30 September 1999 and the amount he would have received had he been promoted to grade G.5 on 1 September 1997, and placing him forthwith on the salary step he would have reached had he been promoted with effect from that date. In a letter of 15 August 2000, which is the impugned decision, the Director-General accepted the Board's recommendation regarding the compensation to be paid to the complainant, but did not concur with the recommendation regarding his step. The complainant was paid compensation in the sum of 14,230 Swiss francs.

B. The complainant contends that the principle of equal pay for work of equal value, as set out in WHO Manual paragraph II.1.30.1, was breached. He also claims that the WHO failed to comply with paragraph 30.2, under the terms of which "posts of approximately equal difficulty and responsibility should be placed in the same grade". He says that from 1 September 1996 up to 1999 he performed duties that were identical to those of certain colleagues in his section whose posts were classified at grade G.5 or G.6 over the same period. Moreover, he alleges

discrimination on the grounds that two of his colleagues performing the same duties as him on a half-time basis became full-time staff members at grade G.5 without any vacancy notice being published.

The complainant also asserts that the WHO failed to comply with Manual paragraph II.1.210, which provides that if a staff member is assigned new duties not included in the post description, for a period exceeding ninety days, a "new post description should be established and a classification review undertaken ... to determine the grade of the post". In practice, he was assigned new duties as from 1 September 1996 and did not receive a post description until October 1999. What is more, it did not have retroactive effect. There was also excessive delay by the Organization in preparing this document, despite the complainant's repeated requests.

He adds that, in breach of Staff Rule 530.2, no annual performance evaluation report was made for him for over three years. It was only in June 1999 that such a report was drawn up.

The complainant asks the Tribunal to quash the impugned decision. He also wants the reclassification of his post to take effect from 1 September 1996 and claims interest of 8 per cent a year on the amounts due from the Organization. Finally, he seeks compensation for moral injury, and costs.

C. In its reply the WHO states that, since the filing of the complaint, it has decided on an exceptional basis to grant the complainant promotion with retroactive effect as from 1 September 1997. Any claim in this respect therefore no longer shows any cause of action.

Citing the Tribunal's case law, the Organization points out that the sole criteria that are decisive in grading posts are "the duties and responsibilities of the post". It adds that the complainant's allegations concerning the delay in issuing his performance appraisal reports are devoid of merit. The delay in preparing the post description was the result of a series of circumstances, and did not in any way amount to discrimination against the complainant. Furthermore, if the latter intended to challenge the appointment of certain colleagues, he should have taken action within the time limits, but failed to do so.

In the view of the WHO, the complainant's claim that the reclassification of his post should have taken effect as from 1 September 1996 has no basis in law or fact. Indeed, the selection of this date is in breach of Staff Rule 380.3.1. According to that Rule the date on which the complainant was entitled to an increase in salary was "the first of the month nearest the date of final approval". As the reclassification decision was taken on 23 September 1999, the promotion should have been effective from 1 October 1999. The Administration has therefore already made an exception to the rule by granting him promotion retroactively from 1 September 1997. The choice of 1 September 1996 also goes against Manual paragraph II.1.210, which gives no indication of the date on which a reclassification should come into effect. Moreover, the complainant's new duties had not yet been determined on that date and his post description could not be drawn up in isolation.

According to the WHO, the complainant suffered no moral injury and his allegations of discrimination are unfounded. It also refuses to pay him interest since it has already made an exception to the rule by deciding to grant his promotion with effect from 1 September 1997, which was the most favourable decision in the circumstances.

D. In his rejoinder the complainant presses his allegations of discrimination. He contends that the refusal to pay him interest runs counter to the decision to grant him promotion with retroactive effect. He presses his request for the promotion to take effect as from 1 September 1996. He adds that he drew up a draft post description himself which, plus or minus a few details, was subsequently adopted.

E. In its surrejoinder dated 20 July 2001 the Organization refers to Judgment 2076, delivered a few days earlier. It asserts that while in that judgment the Tribunal regarded the delay in reclassifying the post as inordinate, it did say that in view of the structural changes and the resulting difficulties the Organization was right to have waited for the situation to settle down before drawing up new job descriptions. The Tribunal deemed that "the Administration should have been in a position to prepare a new job description as from January 1997 and to take the necessary decisions by September 1997 at the latest". The complainant's case being identical

to that of Mr Trambelland on the merits, the WHO argues that the claim that the post reclassification should have taken effect from a date prior to 1 September 1997 must fail.

In the view of the Organization, the delay in reclassifying the complainant's post has already been taken into account in the measures it has taken. It emphasises that in the above judgment the Tribunal dismissed the pleas that Manual paragraphs II.1.30 and II.1.210 had been breached, as well as the allegation of discrimination.

In the light of Judgment 2076, the Organization decided, on an exceptional basis, to pay interest on the amounts paid pursuant to the Director-General's decision of 15 August 2000, as modified by the decision to grant the complainant his promotion with retroactive effect from 1 September 1997. So, it will grant this interest at the rate of 8 per cent a year on the salary paid on each monthly due date until payment has been settled. The complainant's claim in this respect has therefore been met.

F. In his further submissions the complainant argues that the WHO's proposed settlement does not provide a basis for withdrawing his complaint, as it has not offered to pay costs. He contends that his case is not identical to that of Mr Trambelland and says that he has succeeded in proving that he was discriminated against. He repeats that he drew up his post description himself in April 1998. In these circumstances, he argues that the Tribunal cannot therefore find, as it did in Judgment 2076, that the Organization was right to wait for the situation to settle down as a justification for the delay in drawing up the post description.

G. In its observations the Organization explains that it agreed in good faith to pay the complainant interest and that it is for the Tribunal to judge any remaining issues. It adds that, even if it had requested the complainant to draw up a post description in 1996, it would have been necessary to wait for the situation to settle down before finalising it and re-examining the job classification. Judgment 2076 is therefore still pertinent on this point.

CONSIDERATIONS

1. The complainant, who has been employed by the WHO since 1981, first worked as a messenger and later as a clerk. He was then assigned to the Records Management Section (the "Registry") in the Division of Conference and General Services, in which far-reaching structural changes were made, including computerisation as from 1 January 1996. The complainant's duties at grade G.4 were modified and he repeatedly requested a new job description and the upgrading of his job to G.5. But it was not until October 1999 that he received a copy of a memorandum announcing the reclassification of his post to grade G.5 as from 1 October 1999. On 9 December 1999 he appealed to the Headquarters Board of Appeal against the effective date of his promotion.

2. In its report of 15 May 2000, the Board noted the slowness of the reclassification procedure, particularly between January 1997 and July 1998. It concluded that a new post description should have been prepared and submitted for reclassification as from January 1997, and that September 1997 would have been a reasonable deadline for a decision to be taken. It added that the complainant had done "all that could reasonably be expected of him to comply with the WHO's rules on annual performance reports and the description and regrading of his post" and that, in view of serious breaches of the rules, for which the Organization alone was to blame, he was entitled to compensation in an amount equal to the difference between his earnings for the period from 1 September 1997 to 30 September 1999 and the amount that he would have received had he been promoted to G.5 as from 1 September 1997. The Headquarters Board of Appeal also recommended that the complainant should be granted forthwith the within-grade step that he would have attained had he been promoted to G.5 on 1 September 1997, and that he should be reimbursed his lawyer's fees up to an amount of 2,500 Swiss francs upon submission of the bills.

3. By a decision of 15 August 2000, "in the light of all the evidence and particularly the delay in processing the request for post reclassification", the Director-General endorsed the Board's

recommendation to pay the complainant compensation and reimburse his legal fees. However, she refused to grant him the within-grade step he would have reached had he been upgraded as from 1 September 1997; or in other words she did not agree to the rebuilding of his career with retroactive effect.

4. Dissatisfied with that decision, the complainant has come to the Tribunal pleading inadequate redress. In his submission he is entitled to promotion with retroactive effect, and not simply compensation equal to the difference between the amount he ought to have been paid at grade G.5 and what he was actually paid up to 30 September 1999. Furthermore, he says that the promotion should have taken effect as from 1 September 1996. He seeks compensation for the moral prejudice suffered, interest on the amounts due from the Organization and costs.

5. Since the filing of the complaint, the Director-General has decided to make 1 September 1997 the effective date for the reclassification of his post, thereby granting him promotion to grade G.5 as from that date.

6. That decision means that the complainant's main claims are partly without purpose. However, they still show cause of action insofar as the complainant has only been granted promotion as from 1 September 1997, whereas he contends that his reclassification should have taken effect as from 1 September 1996 as should his promotion to grade G.5.

7. The Organization has also decided, as it indicates in its surrejoinder, to pay the complainant interest at the rate of 8 per cent a year on the amounts paid pursuant to the decision to grant his promotion with retroactive effect from 1 September 1997. His claims to the payment of interest are therefore devoid of purpose for the period after that date.

8. In support of his plea that the Organization is wrong to persist in denying him promotion as from 1 September 1996, the complainant seeks to show that the duties he actually performed from that date until 1999 were identical to those of some of his colleagues whose posts were graded G.5, or even G.6, and that he was entitled to have the same grade

and pay as they did. In this respect, he alleges discrimination and refers to the principle of equality set out in Manual paragraphs II.1.30.1 and 30.2, as well as in Article 23(2) of the Universal Declaration of Human Rights. He also cites his performance appraisal reports of June 1996 and June 1999 which, he says, show that he discharged, to the satisfaction of his supervisors, duties similar to those of some of his colleagues at higher grades. He asserts that the delays in processing his application for reclassification were not attributable to him, as he had drawn up his own post description in April 1998, but to the Organization, which breached the provisions of the Manual respecting post classification, and particularly Manual paragraph II.1.210, which says:

"A staff member may be assigned new duties not included in the post description on a full-time basis for a temporary period not exceeding 90 days. If the period exceeds 90 days, a new post description should be established and a classification review undertaken ... to determine the grade of the post."

Lastly, the complainant argues that the Tribunal's case law requires that his reclassification should be fully retroactive and he recalls that no performance appraisal was made for him for three years, in violation of Staff Rule 530.2, which requires annual performance evaluation.

9. The Tribunal concurs with the view of the Headquarters Board of Appeal that there was an inordinate delay in processing the complainant's request for upgrading, but that the Organization was right, before drawing up new job descriptions, to wait for the situation to settle down following the structural changes and the resulting difficulties: the installation of a new computerised system, a changing situation and the evolving nature of staff duties. As in *re* Trambelland, which led to Judgment 2076, the Tribunal, in the light of all the material circumstances, sees no reason to question the Board's conclusion that the Administration should have been in a position to prepare a new job description as from January 1997 and to take the necessary decisions by September 1997 at the latest. The complainant was entitled to claim reclassification under Manual paragraph II.1.210, more than ninety days having elapsed since his duties changed on 1 September 1996. However, that rule on its own lays no obligation on the Administration to prepare a new post description immediately, as the WHO observes. It must, nonetheless, do so within a reasonable period. Although

it did not, the measures it eventually took on the basis of the Board's recommendation afforded the complainant redress for the injustice done.

The case law cited by the complainant cannot have for effect a reclassification coming into force before the date on which the job description could have been completed. It is immaterial in this respect that the complainant himself prepared his own job description and submitted it to his supervisor in April 1998. As in the case of Mr Trambelland, the Administration was lawfully able to set 1 September 1997 as the date on which the complainant's retroactive promotion became effective. Nor does the complainant produce proof, in view of the latest decision in his favour, that he suffered discrimination in relation to his colleagues, who were in different situations of law and fact from his own.

10. The claim for compensation for moral injury arising out of the alleged discrimination against the complainant cannot succeed. But he is right to complain that no evaluation of his performance was carried out for three years and that he received no reply to his repeated requests, and to claim "compensation, however symbolic" under this head. On this point the Organization did not comply with Staff Regulation 530.2, which states that "evaluation shall be made at such intervals as the work situation or the individual's performance requires but in no case less frequently than once a year". The WHO shall therefore pay the complainant compensation of 500 Swiss francs.

11. The complainant is entitled to costs, which the Tribunal sets at 5,000 francs.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim to the quashing of the Director-General's decision insofar as it did not grant him promotion with retroactive effect or payment of interest on the amounts due as from 1 September 1997.

2. The WHO shall pay the complainant 500 Swiss francs in compensation.
3. It shall pay him 5,000 francs in costs.
4. The complainant's other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANÓS

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Lainas (No. 2)
(Interlocutory Order)

Judgment No. 2094

THE ADMINISTRATIVE TRIBUNAL

Considering the second complaint filed by Mr Vassilios Lainas against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 1 September 2000 and corrected on 30 November 2000, Eurocontrol's reply of 9 March 2000, the complainant's rejoinder of 15 May and the Agency's surrejoinder of 24 August 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 1880 (*in re* Lainas) delivered on 8 July 1999. On the advice of his daughter's doctor, the complainant had her hospitalised in the United States for a serious illness. Eurocontrol's Sickness Fund repaid at the full rate (100 per cent) the costs of her operation and of the treatment that preceded it, except for the costs of the hospital stay which it limited to 20,000 Belgian francs a day. As from June 1997, however, the maximum limits set out in Rule of Application No. 10 of the Staff Regulations concerning sickness and accident insurance cover were strictly applied to all costs incurred after the operation.

On 9 December 1999 the complainant filed an internal complaint challenging three statements of account from the Sickness Fund concerning post-operative medical costs. On 3 March 2000 he filed an internal complaint against the implied rejection of a request for special reimbursement that he had submitted on 6 September 1999 for the period from 8 September 1997 to 7 September 1998. The Sickness Insurance Scheme Management Committee met on 23 March 2000. In its report to the Director General, which was forwarded to the complainant on 6 April, it pointed out that the Sickness Fund had already paid out "a large amount by way of an exception", and recommended rejecting the complainant's claims "in view of its previous decision (strict application of the rules as from June 1997 of which the claimant was given prior notice)". By a memorandum of 5 June 2000 the Director of Human Resources rejected the complainant's internal complaints on the Director General's behalf. That is the impugned decision.

B. The complainant's first point is that Article 72 of the Staff Regulations governing officials of the Eurocontrol Agency guarantees reimbursement in full of all costs incurred in the event of serious illness. Although in Judgment 1880 the Tribunal allowed reimbursement to be restricted "notwithstanding the express terms" of this article, the share to be borne by the insured person should not be "financially crippling". He takes the Agency to task for treating the medical costs incurred in the United States as excessive, and alleges that it set the maximum limits arbitrarily: it took Belgium as the basis for a cost comparison although there was no question of treatment in Belgium and his daughter's condition demanded follow up by the same team after her operation as before it. The rules require the Agency to state the reasons for every item it deems excessive, which it has not done.

Secondly, the Sickness Fund denied him special reimbursement although no weighting had been set to take account of the difference in the cost of care between the United States and Belgium. That was in breach of Article 8 of Rule No. 10, the provisions on the interpretation of Rule No. 10 and several basic principles including the freedom to choose one's physician. The complainant submits that the rules allow reimbursement of up to 300 per cent of costs deemed to be reasonable (i.e. non-excessive).

The rejection of his request for special reimbursement is also in breach of Article 72 of the Staff Regulations and Article 8(2) of Rule No. 10 since in a twelve month period he incurred medical costs amounting to more than his average basic monthly salary.

He seeks the quashing of the impugned decision and costs.

C. Citing Judgments 1094 (*in re Gérard* and others) and 1880, Eurocontrol points out in its reply the Tribunal's finding that reimbursement at the full rate does not preclude the application of maximum limits. It observes that, in the opinion of four doctors, the surgery and, *a fortiori*, the post-operative treatment could have been carried out in Europe. The complainant's initial decision to have the operation done in the United States was taken for reasons of expediency and he may not rely on it to obtain special reimbursement from the Sickness Fund of all the treatment that ensued. According to the Agency, the purpose of setting ceilings beyond which costs are treated as excessive is to keep the Sickness Insurance Scheme on a sound financial footing. It points out that the maximum limits it applied to the complainant are two to three times higher than those of the Belgian National Sickness and Invalidity Insurance Institute.

Eurocontrol denies ever challenging the complainant's freedom to choose a physician. It points out that Articles 72(3) of the Staff Regulations and Article 8(2) of Rule No. 10 apply only to the non-reimbursed part (15 or 20 per cent according to the case) of refundable medical expenses, not to non-reimbursed expenses in general (excessive costs or non-medical expenses).

D. In his rejoinder the complainant maintains that the United States was the only place where his daughter could be treated, including after her operation. The reimbursements were based on medical costs in Belgium which were grossly under-estimated, which shows how arbitrary the method of calculation is. Besides, it is discriminatory in that similar medical care costing the same amount may or may not be refunded, depending on where it was provided. He submits that, contrary to the Agency's interpretation, Article 72(3) of the Regulations and Article 8(2) of Rule No. 10 do cover excessive costs. The whole purpose of the mechanism is to determine what

should be done with the non-reimbursed portion of medical expenses where the financial burden on the insured person would be abnormally heavy. The Tribunal acknowledged as much in Judgment 1880, under 13, when it advised the Agency to ensure "that the interpretation does not rob the original rule – especially Article 72(3) – of its meaning".

E. In its surrejoinder the Agency denies setting limits arbitrarily: it either applies the statutory maximum limits or takes average costs in the member State as a reference. Nor did it underestimate the tariffs applied in Belgium: the complainant overlooked the fact that Eurocontrol has financial agreements with numerous medical establishments. Furthermore, in comparing hospital costs he omitted to specify that in Europe prices are "all-inclusive" whereas in the United States all manner of costs and fees have to be added. Lastly, there would be no safeguarding the finances of the Sickness Insurance if its members were able to claim excessive medical expenses by way of special reimbursement.

CONSIDERATIONS

1. The facts that prompted this dispute are set out in Judgment 1880.

The gist of the case is as follows. The complainant's daughter was treated in 1996 for what turned out to be a serious illness requiring special treatment. On the advice of her doctor, the complainant sent her on 5 February 1997 to the United States for hospital treatment at the Memorial Sloan-Kettering Center. Eurocontrol's Sickness Fund, which had agreed on 11 November 1996 to reimburse medical costs for serious illness at the rate of 100 per cent until 11 September 1997, undertook on 15 September 1997 to extend that coverage until 11 September 1998.

A first dispute, about the coverage of medical costs pertaining to the period from 5 February to 3 March 1997, gave rise to Judgment 1880.

2. In this dispute the complainant is challenging a decision of 5 June 2000 to reject his internal complaint lodged on 9 December 1999 against three statements of account from the Sickness Fund dated 10 September 1999 limiting reimbursement of his daughter's post-operative

medical costs to which he claimed entitlement under Eurocontrol's Sickness Insurance Scheme, and his internal complaint of 3 March 2000 against the implied rejection of a claim to special reimbursement submitted to the Sickness Fund on 6 September 1999 pursuant to Article 72(3) of the Staff Regulations and Article 8(2) of Rule of Application No. 10.

3. In the complainant's submission the impugned decision is in breach of Articles 72(1) of the Staff Regulations, Section XV, paragraph 3, of Annex I to Rule No. 10 and of the decisions on his case taken on 11 November 1996 (guaranteeing the reimbursement at 100 per cent for a one-year period) and 15 September 1997 (extending this period for another year). He pleads obvious misappraisal of the facts: under the three statements of account dated 10 September 1999 he was granted only a partial refund of the medical costs incurred by his daughter for surgery undergone in December 1998 and the postoperative treatment. Depending on the type of treatment he had been refunded only 27.04 per cent, 32.22 per cent and 41.01 per cent of the real cost of the care, whereas Article 72 of the Staff Regulations expressly states that staff members and their dependants are covered against the risks of sickness, ordinarily within the limit of 80 per cent of costs incurred. But, in the event of serious sickness, as was his daughter's case, the rate is increased to 100 per cent. This rule is reflected in Section IV, paragraph 1, of Annex I to Rule No. 10.

The complainant asserts that these are the rules on which the Agency based its decisions of 11 November 1996 and 15 September 1997 to refund to him in full the medical costs arising from his daughter's illness.

He recognizes that in Judgment 1880 the Tribunal ruled that, although Article 72 of the Staff Regulations ensures that reimbursement will ordinarily be at the rate of 100 per cent, it does not preclude limiting reimbursement in the interests of safeguarding Eurocontrol's social security scheme. But any such limitation must, he says, be reasonable particularly when the illness is so serious that treatment must be sought abroad, as in his daughter's case.

He pleads breach of Article 72 in that the Sickness Fund's method of reckoning reimbursement makes his share of the medical costs "financially crippling".

In his submission it is plain from the three statements of account of 10 September 1999 that, for most of the medical items, the provisions of Section XV, paragraph 2, of Annex I to Rule No. 10 which in some cases allow setting "maximum limits", do not apply. He observes that "maximum limits" were applied for only three minor medical expenses. Consequently, he considers that the Fund is relying on paragraph 3 of the above referenced provision to substantially reduce the reimbursements, deemed wrongly to be excessive. He adds that implementation of paragraph 3 implies that a specific reason must be given for each item generating excessive costs, which was not the case here. A specific and detailed explanation was the more necessary as it was the seriousness of his daughter's illness that required her emergency hospitalisation in the United States. He asserts that an enquiry or expert medical opinion could confirm that there was no alternative.

4. Eurocontrol denies that hospitalisation in the United States was imperative. It asserts that "even supposing ... that the operation itself and the prior treatment were possible only in the United States, the same ... is certainly not true of the post-operative care and treatment". Having been consulted by the complainant, the Robert Debré Hospital in Paris certified on 25 July 1997 that the post-operative treatment could be carried out in Paris and elsewhere in Europe.

5. The Tribunal considers that, before it rules on the case a number of questions need to be answered by means of a medical enquiry to be entrusted to an expert, appointed by the President of the Tribunal, whose terms of reference will be set out in the decision below.

DECISION

For the above reasons,

1. A medical expert shall be appointed by order of the President of the Tribunal for the purpose of determining whether, and to what extent, the special care required by the illness of the complainant's daughter was obtainable only at the Memorial Sloan-Kettering Center in the

United States, and whether it was necessary for her to remain there until completion of all the treatment required by the evolution of her illness.

2. The expert shall take into consideration all the evidence submitted to the Tribunal and may seek from the parties any relevant information, abiding by the rule that proceedings must be adversarial.
3. The expert shall submit seven copies of his or her report to the Registrar of the Tribunal by 1 April 2002.
4. Copies of the report shall be sent to the two parties, who shall have fifteen days within which to submit comments.
5. The expert's fees and costs shall be borne by Eurocontrol; the amount shall be approved by the President of the Tribunal.
6. Costs are reserved.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* Evensen, Gråberg, Hjaltadóttir,
Vidarsson and Volle**

Judgment No. 2095

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Harald Evensen, Mr Lars Gråberg, Mrs Asthildur Hjaltadóttir, Mr Daniel Vidarsson and Mr Kjetil Volle against the Surveillance Authority of the European Free Trade Association (ESA) on 29 June 2000 and corrected on 9 October 2000, the ESA's reply of 19 February 2001, the complainants' rejoinder of 24 April and the Authority's surrejoinder of 22 June 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As from 1 January 1988 the European Free Trade Association (EFTA) applied a system for adjusting staff salaries based on the cost-of-living index for Geneva. In May 1992 in the course of discussions about establishing the EFTA Surveillance Authority (ESA) and the EFTA Court of Justice, the EFTA Council decided that conditions of employment in the two new bodies would, in principle, be governed by the same rules as the EFTA secretariat. In December 1993 the Council decided not to adjust pay in 1994

because of economic difficulties and budgetary restrictions in member States. Nor was there an adjustment the following year.

On 1 July 1995 a regulation was introduced into the ESA Staff Regulations providing for an annual salary review. Regulation 21 reads:

"Salary"

1. The salary of a staff member shall be that specified in Appendix A to the Staff Regulations.
2. The ESA/Court Committee (i.e. the Committee of Representatives of the Contracting Parties to the Agreement between the EFTA Member States on the establishment of a Surveillance Authority and a Court of Justice) shall review Appendix A every year with a view to maintaining competitive employment conditions. ESA shall formulate proposals to this effect."

This regulation is still in force.

On 4 July 1996 the EFTA Council set up an ad hoc working group to review the competitiveness of EFTA employment conditions. In its report of 7 November 1997 the working group recommended adjusting pay as from 1 January 1998 to take account of inflation in the previous year, but made no recommendation as to the amount of the adjustment. The report also stated that the representatives of the ESA and of the EFTA Court, as well as the representatives of the staff of both institutions, intended to recommend to the ESA/Court Committee adjustment in full for inflation accrued since 1 July 1995. In a note of 14 November 1997 the Authority recommended to the ESA/Court Committee that salaries should be adjusted on this basis as from 1 January 1998. It noted that there had been 5.3 per cent inflation between 1 July 1995 and 31 December 1997 and that the cumulated inflation for the period 1993 to 1997 was 11.1 per cent. On 27 March 1998 the Committee decided on a 3 per cent increase with retroactive effect from 1 January 1998 for staff salaries at the ESA and the Court, in order to take account of inflation from 1 July 1995 to 31 December 1997.

In a memorandum of 9 July 1999 the Staff Committee of the ESA urged the Administration to suggest to the ESA/Court Committee ways and means of making salaries more competitive. It observed that an increase of 15.8 per cent would be needed to keep pace with the salaries of civil servants in member States. In a note of 15 September 1999 the ESA and the Court pointed out to the ESA/Court Committee that an adjustment of

23.5 per cent would be necessary to restore salary competitiveness to its 1993 level, and that purchasing power had dropped by 15 to 16 per cent in the last three years. As a remedy it recommended a 10 per cent pay adjustment with retroactive effect from 1 January 1999. At a session held on 15 December 1999 the Committee decided to increase the salaries of staff at the ESA and the Court by 3 per cent as from 1 January 2000.

At a meeting convened on 16 December 1999 pursuant to Regulation 45(6) of the ESA Staff Regulations, Staff Association representatives informed members of the Administration that they disagreed with the ESA/Court Committee's decision. In a letter of 2 February 2000 to the President of the ESA, the Chairman of the Committee of the ESA Staff Association gave notice of an appeal by members and former members of staff, including the complainants, alleging failure by the ESA to meet its obligations under Regulation 21. He accordingly asked the President to convene the Advisory Board under Staff Regulation 46. By a letter of 9 February the ESA President invited Norway, the member State holding the Chairmanship of the ESA/Court Committee and Iceland, as Norway's successor, to each appoint a member to the Advisory Board. The Board would have sixty days within which to report. By a letter of 11 April 2000 he informed the Chairman of the Committee of the Staff Association that, Norway having declined to appoint a member to the Advisory Board, he was not in a position to take any decision about the appeal. The complainants are now impugning the implied rejection of their appeal.

B. The complainants submit that the decision of 15 December 1999 of the ESA/Court Committee is unlawful on three counts.

First, the latter's implied refusal to review the salary scales for 1999 is in breach of the statutory requirement of a yearly pay review, which is laid down in Regulation 21(2) and is a safeguard of stability for staff. In Judgment 1419 (*in re Meylan and others*) the Tribunal held that the use of the word "shall" in statutory provisions makes the latter binding in law.

Secondly, the Committee's decision is in breach of the obligation, also established in Regulation 21(2), to maintain competitive employment conditions. What is more, it disregards principles set by the case law in that, by eroding salaries, it substantially jeopardises the balance in contractual

relations between the organisation and its staff. Precedent has it that in international organisations, when salary increases have been insufficient at previous adjustments, staff may claim the shortfall at a forthcoming adjustment. The complainants point out that the Administration itself acknowledged that the deterioration in employment conditions is making recruitment difficult.

Thirdly, the Committee gave no explanation whatsoever of its decision. It therefore failed in the duty laid on it by Judgment 1821 (*in re Allaert and Warmels No. 3*) to use a methodology which will ensure results that are stable, foreseeable and clearly understood. The complainants point out that the President of the ESA himself observed at the session of 15 December 1999 that the way the decision was made was "procedurally inadequate and insufficiently transparent".

The complainants want the Tribunal to quash the implied rejection of their appeal and to send the case back to the Authority for a new decision on salary adjustment for the period in question. They also claim interest at the rate of 8 per cent a year as from 1 January 1999 on any amounts awarded. They claim costs.

C. In its reply the Authority contends that the complaints are irreceivable because the decision of 15 December 1999 was taken by the ESA/Court Committee and so is beyond challenge. The ESA cannot be held responsible for a decision it did not take. Furthermore, the complainants' pleas are irreceivable because they were not made in the internal appeal.

The first plea is also time-barred. Not until July 1999 did the complainants protest against the failure to review salary scales every year, but they should have done so on receiving their first pay slips of 1999. The same applies to their second plea: it is too late now for them to challenge earlier decisions on salary adjustment.

In subsidiary pleas on the merits, the Authority asserts that the Committee did meet its obligations, since it awarded a 3 per cent increase both in 1998 and in 2000. The case law recognises that the adjustment of salaries is at an organisation's discretion. In setting salary scales the Committee is not bound to follow the views of the President of the Authority. Besides, in seeking to maintain competitive employment

conditions the Committee not only reviews salaries, but it considers other factors such as staff allowances. Lastly, the ESA points out that international civil servants do not have an acquired right to an automatic indexing of their pay.

D. In their rejoinder the complainants explain that, before appealing, they waited to receive their pay slips for January 2000 as being the first individual application by the ESA of the Committee's decision of 15 December 1999. They point out that they were unable to object until the Committee took its decision – which it did only in December 1999 – and applied it as from 1 January 2000 instead of 1 January 1999 as the Administration had proposed. As to the receivability of their pleas, citing the case law they point out that while new claims are irreceivable, new pleas are another matter.

On the merits the complainants observe that the administrations of the Court and the Surveillance Authority, particularly the latter's President, share their view that the adjustment was inappropriate. That, they say, is a fair indication that the decision was unlawful. Allowances are incidental to salaries, and besides they have not been increased. In the complainants' submission, if employment conditions are to remain competitive, salary adjustments must at the very least offset inflation. They describe the salary adjustment policy as "arbitrary in the extreme".

E. In its surrejoinder the Authority retorts that the staff regulations in force since 1995 do not allow the ESA/Court Committee to set pay arbitrarily: they require it to review the salary scales annually with a view to maintaining competitive employment conditions. Furthermore, the Committee must first study proposals put forward by the Authority, and the criteria used in determining pay are objective. Besides, the complainants have failed to show that the salary increase of 1 January 2000 was insufficient to keep their employment conditions competitive. According to the ESA, the complainants have put three new "claims" to the Tribunal: (1) that the Committee has not reviewed the salary scales every year; (2) that it has not maintained competitive employment conditions; and (3) that it has not used a method which ensures results that are stable, foreseeable and clearly understood. The ESA submits that within-grade step increments

amount to a 4 to 5.5 per cent salary increase every eighteen months. The complainants overlook that fact and so their reasoning is fundamentally flawed. Lastly, any comments by the President or an official of the Authority "may not be regarded as conclusive evidence" since they come from "interested parties" who stand to gain financially from a salary increase.

CONSIDERATIONS

1. The complainants are employees or former employees of the EFTA Surveillance Authority. They are challenging the rejection of an appeal they filed on 2 February 2000 seeking an increase in their salaries as from 1 January 1999.
2. The salaries of the ESA staff are adjusted in accordance with Staff Regulation 21 which has been reproduced under A above.
3. Pursuant to this regulation, the ESA/Court Committee decided on 27 March 1998 to adjust the salaries of the staff of the ESA and the Court by 3 per cent with retroactive effect from 1 January 1998, whereas the Authority had proposed a larger increase to take account of inflation. Representatives of the staff objected to that decision because it offered to staff conditions of employment which were not competitive. However, it was challenged neither in an internal appeal nor before the Tribunal.
4. On 15 September 1999 the ESA and the Court recommended to the ESA/Court Committee a 10 per cent salary adjustment with retroactive effect from 1 January 1999. But the Committee decided on 15 December 1999 to apply a 3 per cent salary adjustment with effect not from 1 January 1999 but from 1 January 2000.
5. Once the decision was implemented several members of staff appealed, on 2 February 2000, against what they saw as a breach of their statutory rights. They asked the President of the ESA to refer their appeal to the Advisory Board in accordance with Regulation 46. They sought the

quashing of the decision of 15 December 1999 and a salary adjustment of 18.4 per cent from 1 January 1999 and of 5.5 per cent from 1 January 2000.

6. The Advisory Board was unable to meet, one of the member States having declined to appoint a representative. The complainants have therefore come to the Tribunal claiming the quashing of the Committee's decision of 15 December 1999 and all due effects in law. They further ask the Tribunal to send the case back to the Authority for a new decision on salary adjustment for the material period. They claim interest at the rate of 8 per cent a year as from 1 January 1999 on any amounts awarded and costs.

7. In rebuttal, the Authority raises several objections to receivability. All of them fail.

8. It submits first that the decision of 15 December 1999, taken by the ESA/Court Committee, is beyond challenge and that the complaint, being lodged against the Authority – which is not the author of that decision – is irreceivable. What the complainants are in fact impugning is their pay slips for January 2000 as being the first individual application of the decision of 15 December 1999, which they may challenge insofar as it affects them adversely. The complainants are paid by ESA and so may challenge any individual decisions that affect their terms of employment, particularly salary, regardless of who has authority over such decisions.

9. Secondly, the ESA submits that the complainants' claim to have their pay adjusted as from 1 January 1999 is time-barred and so irreceivable.

It considers that the complainants' objection to the Committee's failure to carry out the annual review of salary scales in 1999 should have been raised upon receipt of their first pay slip for that year.

That argument overlooks the fact that the annual adjustment procedure for 1999 ended only on 15 December 1999, when the Committee refused by implication an adjustment for that year despite a proposal made by the Authority and the Court on 15 September 1999 for a 10 per cent adjustment as from 1 January 1999. Not until the contested decision of 15 December 1999 was actually implemented were staff informed that there was to be no adjustment for 1999. They may therefore challenge the application of that

decision to them and claim a salary increase as from 1 January 1999 without committing any breach of good faith or of the rules on time limits for appeal.

10. Lastly, the Authority contends that the complainants' three main pleas, which underpin their whole line of reasoning, not having been submitted to the Advisory Board, are irreceivable for failure to exhaust the internal means of redress available under the Staff Regulations. As the complainants rightly observe, the case law draws a distinction between claims, which may be put to the Tribunal only if they have been made in the internal procedure, and pleas, which are not subject to that rule. In this case the complainants' claims to the Tribunal are not different from the ones they expected the Advisory Board to examine, and the Authority may not object to the receivability of pleas put forward in support of them.

11. On the merits the complainants contend that the contested decisions; i.e. their pay slips for January 2000, were taken pursuant to a Committee decision which was in breach of the obligation to review salary scales every year, the obligation to maintain competitive employment conditions and the obligation to apply a methodology able to ensure results that are stable, foreseeable and clearly understood.

12. In rebuttal the ESA argues that in prescribing – as its terms of reference allow – a salary adjustment of 3 per cent, the Committee acted within the discretionary authority conferred on it by the rules. The fact that the complainants are unhappy with the level of their pay affords no basis in law for their claims. In its submission, their plea that the Committee failed to review the salary scales for 1999 is out of time. As to the plea that the ESA failed in its obligation to maintain competitive employment conditions, the Authority observes that, even if it were receivable, the complainants have failed to show that it is founded, particularly in view of the benefits and emoluments staff receive in addition to their pay. Lastly, it denies that it lacks a methodology able to ensure results that are stable, foreseeable and clearly understood, and contends that the complainants' claims are an attempt to have adjustments linked with the cost-of-living index for Geneva, when indexing – adopted in 1988 – was formally abandoned in 1995.

13. The Tribunal finds none of these arguments convincing. As precedent has shown time and again, although in international organisations the determination of salary scales is discretionary, that discretion must be exercised within a framework of rules drawn from both the relevant statutory provisions and the general principles of clarity, stability and foreseeability defined in the case law (see, for example, Judgment 1821).

In this case Regulation 21, cited above, says that salary scales are to be reviewed "every year" and that the decision-making authority must pursue the objective of "maintaining competitive employment conditions". It is plain on the evidence that although the ESA quite legitimately proposed to the Committee an adjustment for 1999 – the previous one having been for 1998 – the latter took no decision for 1999 and prescribed an adjustment only for 2000. It thus failed to meet the obligation laid on it by Regulation 21.

What is more, the ESA and the Court recommended an adjustment of 10 per cent with retroactive effect from 1 January 1999; the President of the ESA specifically stated that a 3 per cent increase from 1 January 2000 was inappropriate; and the evidence shows that the purchasing power of staff had been seriously eroded and that the Authority was having difficulty in recruiting staff. Yet for all that the ESA offers not a shred of evidence to suggest that the contested adjustment was set at a rate capable of "maintaining competitive employment conditions". Quite clearly, the Authority neither developed nor used a methodology able to ensure results that are stable, foreseeable and clearly understood in deciding against an adjustment for 1999 and on an award of only 3 per cent from 1 January 2000. Nor has the Authority given any rational explanation of how it reached that figure although the President acknowledged that the decision process lacked transparency.

14. The conclusion is that the complainants are right in pleading a procedural flaw in the adjustment of their salaries from 1 January 1999. The Authority's contention that they are not entitled to have their pay automatically indexed to the cost of living may be right. But they are entitled to have the level of their pay set in accordance with the conditions laid down in the Staff Regulations and Rules and by means of a

methodology which is in keeping with the general principles of international civil service recalled time and again in the case law. The Tribunal will not itself determine the methodology to be used nor the level to which pay must be adjusted in order to take account of all the allowances that may be due to the complainants. It therefore sends the case back to the Authority, as the complainants request, for a new decision on salary adjustment for 1999 and 2000. The amounts awarded to the complainants as an outcome of the adjustment shall bear interest at the rate of 8 per cent a year as from the dates on which they were due.

15. Since the complainants are successful, they are entitled to an overall award of costs, which the Tribunal sets at 6,000 euros.

DECISION

For the above reasons,

1. The decisions rejecting the complainants' appeals of 2 February 2000 are set aside.
2. The case is sent back to the Authority, which shall review their remuneration since 1 January 1999, in accordance with 14 above.
3. The Authority shall pay the complainants a total amount of 6,000 euros in costs.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET



*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Bruce

Judgment No. 2096

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Riitta Pia Kaarina Bruce against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 18 October 2000 and corrected on 29 November 2000, the Organisation's reply of 8 March 2001, the complainant's rejoinder of 6 June and the OPCW's surrejoinder of 4 September 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of Finnish nationality and was born in 1959, joined the Provisional Technical Secretariat of the Preparatory Commission for the OPCW on 3 October 1994. She was recruited as Head of Laboratory in the Verification Division at grade P-4 on a one-year fixed-term contract. The contract was renewed twice. On 23 May 1997 the OPCW took over from the Preparatory Commission. It granted the complainant a three-year fixed-term contract starting on 24 May 1997.

By an Information Circular dated 23 April 1998, the Director-General informed staff members with fixed-term contracts that he intended to extend their appointments by two years provided that they met the

high standards of efficiency, competence and integrity required. His final decision would be based first and foremost on the performance appraisals of the staff members.

During the month of August 1999, the complainant's direct supervisor asked her whether she would be interested in a contract renewal, and she indicated that she would. On 24 August she was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5 and that her contract would not be renewed. In view of the expiry of her contract, two posts were proposed to her. In an e-mail dated 31 August, the Director-General announced to the management the decisions that he had taken for the reorganisation of the laboratory.

The complainant was transferred to a post in the External Relations Division at grade P-4 in September 1999, particularly to coordinate the OPCW's website. The Contract Renewal Board met on 20 September and 5 October 1999 to review all renewals of fixed-term contracts expiring in 2000. Considering that the complainant's performance was below the standard required, it recommended that her contract should not be renewed. On 6 October 1999 the Director-General informed her in writing that her contract would not be renewed. In a communication of 3 December 1999, the complainant requested him to review his decision. He replied on 14 December 1999 that he could not accede to her request.

On 14 January 2000 the complainant appealed to the Appeals Council, which submitted its report to the Director-General on 6 July. The panel considered that the OPCW had not provided the complainant the opportunity to improve and that she had been given legitimate expectations that her contract would be renewed. It made a majority recommendation to pay her financial compensation equivalent to one year's salary. By a communication of 24 July 2000, which is the impugned decision, the Director-General informed the complainant that he did not accept this recommendation and that he was therefore upholding his decision not to renew her contract.

B. Citing the Tribunal's case law, the complainant acknowledges that decisions concerning contract renewals are within the discretion of an organisation, but asserts that such decision cannot be taken arbitrarily.

The complainant alleges procedural flaws. Firstly, she refers to the page of the minutes containing both the Contract Renewal Board's recommendation and the Director-General's decision on her case; she says it is clear from that document that the OPCW did not comply with the Administrative Directive of 20 September 1999 establishing the Board, and particularly the rules respecting its composition. She contends that the Director of her division did not attend the Board's meeting. Secondly, she emphasises that her last performance appraisal report was not submitted to the Board, as it had not yet been completed. The Board did not therefore take all the relevant documents into account in its decision.

Furthermore, she says that the OPCW did not comply with the obligation to give reasons for its decision not to renew her contract. The only reason proffered was that the quality of her performance was below the standard required. The complainant says that this reason is in total contradiction with the assessments by her supervisors in her performance appraisal reports, both with regard to her former duties as Head of Laboratory and her subsequent work.

With reference to the Information Circular of 23 April 1998 and her interview in August 1999 with her direct supervisor, the complainant contends that the OPCW gave her legitimate expectations that her contract would be renewed. Moreover, the OPCW did not respect the principle of good faith: if the Director-General was not satisfied with her performance, he should have spelled out his criticisms, indicated how she could improve her performance and given her time to make up for her deficiencies.

The complainant asks the Tribunal to set aside the impugned decision and order her reinstatement, or, subsidiarily, payment of a sum equivalent to two years' gross salary plus allowances as compensation for material injury. She also claims compensation for moral injury, and costs.

C. In its reply the OPCW denies that the procedure was flawed. In the first place, the composition of the Contract Renewal Board was lawful. The OPCW produces the summary minutes of the Board's meeting,

showing that all the members were present. It adds that the Board based its decision on all the relevant documents, and the applicable rules did not compel the OPCW to accelerate the complainant's performance appraisal procedure with a view to the examination of her case. Furthermore, even if her last performance appraisal report had been available, the Board's decision would not have been different: in view of the inefficiency of the laboratory, it was important to evaluate the complainant's actions, rather than to examine her performance appraisal reports.

Citing the Tribunal's case law, the OPCW asserts that it is not an absolute principle that reasons must be given for an unfavourable decision. In the present case, it considers that although it might have been appropriate to give reasons in the letter of 6 October 1999 for the decision not to renew the contract, the Organisation was not obliged to do so because the complainant had already been informed orally on 24 August and in writing on 31 August 1999. Detailed reasons were also made known to her during the internal appeal procedure. The general assessments contained in her performance appraisal reports should in principle have ensured the renewal of her contract. However, her performance at a professional level was not beyond reproach. In view of the "serious malfunctioning" of the laboratory, it was the responsibility of the Director-General, in his capacity as Head of the Administration, to take measures in the interest of the OPCW. His decision was not therefore in any way arbitrary.

The conversation between the complainant and her supervisor in August 1999 has to be placed in the context in which it occurred, as it was only a question of ascertaining the complainant's intentions. The OPCW contends that the principle of good faith was respected and that the complainant suffered no moral injury. It points out that the post occupied by the complainant was abolished after the expiry of her contract as there was no budgetary allocation for it.

Lastly, the OPCW asks the Tribunal to order the complainant to pay costs.

D. In her rejoinder the complainant argues that the OPCW, which is hard put to defend the lawfulness of the impugned decision, has continued to misrepresent the facts and to discredit her very good performance.

She asserts that the summary minutes produced by the OPCW are of no value as evidence, particularly since they are not dated. The OPCW's arguments concerning the composition of the Contract Renewal Board must be disregarded as there is no evidence that the Director of the Division to which she belonged was actually present when her case was examined. She adds that the OPCW, which does not deny the Board's general obligation to take into account the performance appraisal reports of staff members, cannot argue that it did not have to examine her last report merely because it was not ready. She says that the OPCW's internal problems cannot be used to justify the breach of an obligation. Basing herself on the case law, the complainant contends that it is a fundamental obligation of an organisation to examine the performance appraisal reports of staff members before taking the decision not to renew their contracts.

The complainant, arguing that she was wrongly held responsible for the inefficiency of the laboratory, says that she was used as a scapegoat. She emphasises that the OPCW admitted, at least implicitly, that the Information Circular of 23 April 1998 created a legitimate expectation of contract renewal for staff members meeting the high standards of efficiency, competence and integrity required.

E. In its surrejoinder the OPCW presses its pleas. It argues that the complainant was not held responsible on her own for the malfunctioning of the laboratory, and points out that the contracts of her direct supervisor and the Director of the Division to which she belonged were not renewed either. It presses its counterclaim for costs.

CONSIDERATIONS

1. The complainant, who was employed by the OPCW as Head of Laboratory at grade P-4, had a three-year fixed-term contract from 24 May 1997.

2. In an Information Circular of 23 April 1998, the Director-General informed staff members with fixed-term contracts of his intention to extend their appointments, initially granted for three years, by a further two years provided that they had fully demonstrated that they met the high standards of efficiency, competence and integrity required.

On 24 August 1999 the complainant was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5, and that her contract would not be renewed; she would have the choice of two posts until her contract expired.

The Director-General informed the management on 31 August of the decisions he had taken for the reorganisation of the laboratory.

In accordance with the choice that she had made, on 8 September the complainant was transferred to the External Relations Division, mainly to coordinate the OPCW's website.

On 20 September the Contract Renewal Board recommended that her contract should not be renewed on the grounds that her performance was below the standard required. The Director-General accepted this recommendation and informed the complainant by a letter of 6 October that her contract would not be renewed.

3. In a letter of 3 December 1999 the complainant requested the Director-General to review his decision. That request was refused in a reply of 14 December.

On 14 January 2000 she lodged an appeal with the Appeals Council, which issued its report on 6 July. The panel considered that the OPCW had failed to give the complainant a clear warning to allow her time to improve and that it had given her legitimate expectations that her contract would be renewed. Considering that reinstatement could not be envisaged, the panel made a majority recommendation to the Director-General to grant the complainant financial compensation equivalent to one year's salary. In a dissenting opinion one member of the Appeals Council nevertheless considered that the OPCW could have decided to reinstate her and that the financial compensation to be granted should be equivalent to two years' salary.

By a letter of 24 July 2000, the Director-General informed the complainant that he rejected the panel's recommendation and was upholding his decision not to renew her contract. This is the decision that is being impugned.

4. The complainant asks the Tribunal to set aside the impugned decision and to grant full redress, namely to order her reinstatement or, subsidiarily, the payment of a sum equivalent to two years' gross salary plus allowances as compensation for material injury. She also claims moral damages and costs.

In support of her claims, the complainant has four pleas. She alleges procedural flaws, breach of the obligation to give good reason for a decision not to renew a contract, non-compliance with her legitimate expectations that her contract would be renewed and failure to observe the principle of good faith.

5. Consistent precedent has it that an international organisation has broad discretion in deciding not to renew a fixed-term contract. The Tribunal may exercise only a limited power of review over such a decision and will quash it only if it shows a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision (see Judgment 2007, *in re Diouf*, under 7).

The claims will therefore be examined on the basis of these criteria, as developed by the Tribunal.

6. As procedural flaws, the complainant contends that the Contract Renewal Board was not properly constituted and that it did not take into account all the relevant documents when examining her case.

Composition of the Contract Renewal Board

7. The complainant argues that the OPCW did not comply with the Administrative Directive of 20 September 1999 – bearing the reference

OPCW-TS/AD/33 – which established the Contract Renewal Board under Interim Staff Rule 4.3.01 and determines the composition and procedural rules of the Board.

In September 1999, Rule 4.3.01 provided that:

“The appointment, contract renewal and promotion of staff members shall be reviewed by (an) appointment board(s). The terms of reference and composition of the appointment board(s) will be set out in an Administrative Directive.”

Paragraph 2.1 of the above Administrative Directive provides that:

“The [Contract Renewal] Board shall review all cases of contract renewals for staff members on fixed-term contracts.”

Paragraph 3.1 of the directive states that:

“The Board shall consist of the following:

Chairperson: the Director-General;

Members:

- (a) the Deputy Director-General;
- (b) the Chairperson of the Staff Association;
- (c) the Director of the Division or Office to which the post belongs;
- (d) the Legal Adviser; and
- (e) one other Director appointed by the Director-General, either on an ad hoc basis or for a specific period of time.”

8. The complainant argues that the page of the minutes of the Contract Renewal Board’s meeting that she produced with her complaint does not show that the Director of her division was present during the examination of her case. She says that the Board’s recommendation was therefore tainted by a procedural flaw, which was all the more serious as the person best placed to give an appraisal of her performance did not attend the meeting.

The OPCW denies that there were procedural flaws and produces a document headed “summary minutes”, proving that all the members of the Board were present during the examination of the complainant’s case.

The OPCW states that the Director of the Division to which the complainant belonged was indeed present during the discussion of her case. The fact that his signature does not appear on the extract of the minutes produced by the complainant is simply because the minutes were only signed by the permanent members of the Board. They were the only ones to be present at the examination of all the cases and they

therefore bore witness to the accuracy of the minutes as a whole. The other directors, who only attended meetings during the examination of the cases of staff members under their authority, did not sign the minutes.

9. The complainant is right to conclude that the summary minutes produced by the OPCW do not prove the presence, during the examination of her case, of the Director of the Division to which she belonged. Even though this document indicates that each case was considered on the basis of a "recommendation by the Director of the Division or Office to which the post belongs" (a recommendation may be made in writing) and that all the Board Members were present, nowhere is it mentioned that the Director of the Division to which the complainant belonged was present, and his name is not among those of the Board members who signed the summary minutes.

The OPCW endeavours to justify the absence of a signature by the Director of the Division on the summary minutes by means of a distinction, which is not made in the Administrative Directive, between permanent members who had to sign the minutes and others who did not. But the conclusion must be that the OPCW, upon which the burden of proof rests, has not produced evidence that the Director of the Division to which the complainant belonged was present during the examination of her case.

The complainant is therefore correct in asserting that there was a procedural flaw, as the OPCW has provided no proof that the Contract Renewal Board was properly constituted.

Failure of the Contract Renewal Board to take into account all the relevant documents.

10. The complainant claims that the rules set out in the Administrative Directive of 20 September 1999 were not met, firstly, because the Contract Renewal Board did not take into account her performance appraisal report for 1999, which should have been prepared with a view to the examination of her case by the Board and, secondly,

because a recommendation by the Director of her division was not among the documents submitted to the Board.

11. With regard to the alleged non-compliance with the obligation to take into account her performance appraisal report, the complainant points out that paragraph 2.2 of the Administrative Directive of 20 September 1999 provides that:

"... the [Contract Renewal] Board shall apply the criteria contained in the Chemical Weapons Convention, the OPCW Staff Regulations and Rules, and relevant administrative directives. Performance and conduct will be evaluated first and foremost on the basis of documents available in the staff member's personnel file."

She adds that, from this point of view, the relevant provision is Regulation 4.4(a) of the OPCW Staff Regulations, which states that a contract extension shall be assessed "upon, inter alia, the staff member's performance measured in accordance with a rigorous performance appraisal system". The Director-General's Information Circular of 23 April 1998 confirms the obligation to take into account "first and foremost" the performance appraisal reports of a staff member in determining whether he or she meets the high standards of efficiency, competence and integrity required.

12. In its reply the OPCW submits that the Contract Renewal Board examined all the required performance appraisal reports. It points out that these reports are drawn up each year, in the complainant's case in October. Even if the 1999 performance appraisal report had been completed strictly within the time limits, it could not have been submitted to the Board for examination on the merits on 20 September 1999. Moreover, the Administrative Directive determining the Board's procedure did not require the usual appraisal process to be accelerated with a view to the examination of a case.

Lastly, the OPCW contends that, even if the complainant's performance appraisal report for 1999 had been available to the Board, the outcome of its examination of her case would not have been changed. The appraisal of the complainant's overall performance, which was rated as "good" in this report, is in line with the ratings "good" and "very good" in the reports for the years 1994 to 1998. According to the OPCW, the

determining factor when examining the possibility of renewing the complainant's contract was not her performance appraisal reports, but the malfunctioning of the laboratory, of which the Director-General had been informed by an independent source. In his assessment of the three staff members in charge of the laboratory the Director-General placed importance on their professional ability rather than their staff reports.

13. But the Organisation's plea is wrong.

The texts cited above show that the Board was under the obligation to take into account performance appraisal reports. It is also demonstrated that the performance appraisal report for 1999 had not been completed for submission to the Board. Yet before a decision is taken not to renew a contract, precedent has it that it is a fundamental obligation to examine the staff member's performance appraisal. Failure to comply with that obligation constitutes a procedural flaw as it has the effect of excluding an essential fact from consideration (see, in particular, Judgment 1525, *in re Bardi Cevallos*, and the case law cited therein).

The complainant's last performance appraisal report was only available on 23 November 1999, and the Contract Renewal Board's recommendation is dated 20 September 1999. The conclusion is therefore that the complainant's performance appraisal report for 1999 was not taken into account when deciding that her contract would not be renewed and an essential fact was therefore overlooked.

14. The challenged decision is therefore tainted by procedural flaws and must accordingly be set aside, without needing to go into the other arguments and pleas.

15. The complainant seeks her reinstatement, but the Tribunal finds this remedy inappropriate, particularly since the post that she held has been abolished. It is therefore bound to award damages in compensation for the material and moral prejudice arising out of the unlawful decision not to renew her fixed-term contract. Taking into account all the circumstances of the case, and particularly the fact that the complainant was not entitled to the automatic renewal of her contract, the Tribunal sets the compensation due at 40,000 United States dollars.

16. Having succeeded, the complainant is entitled to costs, which are set at 6,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The OPCW shall pay the complainant 40,000 United States dollars in damages under all heads.
3. It shall pay her 6,000 euros in costs.
4. The OPCW's counterclaim is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

NINETY-SECOND SESSION

In re Deville and others
In re Gasser

Judgment No. 2097

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the World Health Organization (WHO) on 2 December 2000, and corrected on 7 March 2001 by Mr Gérard Bancal, Mr Jacques Deville, Mr Laye Doumbouya, Mr Philippe Dubos, Mr Peter Falter, Ms María Isabel Gallarza Goitia Lavilla, Mr Raimundo Gomes da Silva Arbenz, Ms Geneviève Mermin Martínez, Mr Oscar Nascimento, and Ms Maria Luisa Perreten, the WHO's reply of 11 June, the complainants' rejoinder of 12 September, and the Organization's surrejoinder of 26 October 2001;

Considering the complaint filed by Mrs Doris Gasser against the WHO on 2 December 2000 and corrected on 7 March 2001, the WHO's reply of 7 June, the complainant's rejoinder of 12 September, and the Organization's surrejoinder of 26 October 2001;

Considering the further submissions filed by the complainants on 9 October 2001 at the Tribunal's request and the Organization's comments thereon of 17 October 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are all General Services staff members at the WHO. At the material time, most of them worked in the Division of Conference and General Services (CGS). In 1995 a decision was taken to abolish a total of 167 posts at WHO Headquarters, with effect from 1 January 1996; ninety of these posts were in CGS. The Director of CGS conveyed this information to all staff members of the Division in a memorandum dated 17 July 1995. On 21 July Information Circular IC/95/65 was issued, explaining to all Headquarters staff the reasons for the abolition of posts, the consequences that could arise for staff members, the procedure to be followed in a reduction-in-force (RIF) exercise, and the anticipated time frame of the process. Information Circular IC/95/66, issued on 28 July, informed all Headquarters staff that special measures for voluntary separation from service would be taken in order to minimise the number of "forced departures".

Despite all these measures, it was foreseen that 22 staff members in CGS would have to be separated from service after the RIF exercise. As a means to avoid this, on 23 October 1995 the Director-General decided to convert 24 vacant, full-time posts in CGS into 48 half-time posts. In a memorandum of 23 October to the staff members concerned, the Director of CGS explained the process of converting the full-time posts to half-time and he also organised several meetings with them to discuss it. Staff were informed that there would be a roster created of those interested in accepting short-term contracts to supplement their half-time posts.

On 25 October 1995 the Director of CGS offered one half-time post, starting on 1 February 1996, to each staff member whose post would be abolished. They were given until 6 November 1995 to respond. Staff members who declined the offer could opt to participate in the RIF exercise. Seven of the complainants accepted the offer at that time and four of the complainants accepted offers of half-time employment after being unsuccessful in the RIF exercise.

In a memorandum dated 6 February 1996 from the Director of CGS, staff members on half-time posts were asked to indicate their interest in

being offered short-term contracts which would supplement their half-time fixed-term appointment. The short-term contracts were to be offered at step one in the relevant grade. Under the WHO Rules, staff appointed under short-term contracts were not eligible for certain allowances and indemnities or for participation in the United Nations Joint Staff Pension Fund. The exclusion from participating in the Pension Fund was removed in January 1997. By a letter of 3 July 1998 from an official in Personnel, each of the complainants was offered a conversion of their half-time, fixed-term appointment into a full-time, fixed-term appointment, effective from 1 July 1998. They were asked to express their acceptance of the offer by signing and returning a copy of the letter.

On 12 August 1998 the complainants, who had accepted the offer, wrote to the Director of the Division of Personnel asking for the possibility to have contributions made to the Pension Fund, retroactively, for the period they were under short-term contracts but not eligible to participate in the Fund. Following a series of correspondence and meetings, and having received no satisfactory response to their request, the complainants appealed to the Headquarters Board of Appeal on 13 August 1999. In addition to their claim for Pension Fund contributions, they made claims for "grade indemnities" and dependants' allowance. In its report dated 29 May 2000 the Board of Appeal concluded that the Administration had followed the rules in force concerning short-term contracts in terms of step within the grade and of the payment of allowances, and therefore recommended rejecting those claims. However, it considered the claim concerning pension fund contributions to be allowable. On 5 September 2000 the Director-General informed the complainants that, as recommended by the Board, she had exceptionally granted their retroactive participation in the Pension Fund but rejected the rest of their claims. That is the impugned decision.

B. The complainants submit that the Administration did not clearly explain the terms and conditions under which the short-term contracts would be offered. Therefore, they assumed that these contracts would be offered at their existing grade and step, with provisions for dependants' and language allowances, and with contributions made to the Pension Fund.

The WHO's treatment of them, as short-term staff members for the balance of their half-time assignments, was irregular and a violation of accepted norms of international law. They were not short-term staff members, but rather international civil servants whose fixed-term contracts had been reduced to half-time. In support of this statement they cite Article 1(d) of the Part-Time Work Convention, 1994 (No. 175), of the International Labour Organization (ILO) and contend that the WHO erred when it applied Staff Rule 1320 (relevant to short-term workers) to them. In fact, they submit that the Staff Rules make no mention of short-term contracts, only short-term staff. It is not possible for a fixed-term or permanent contract holder to be, concurrently, short-term staff, even if that person is remunerated under a short-term contract. Under the wording of the ILO's Convention, the complainants were "full-time workers affected by partial unemployment". The "extra hours" worked by the complainants should not have been regarded as separate short-term contracts, but as extensions of their already existing relationship with the Organization.

The WHO's failure to pay the complainants the same benefits and salary as paid to their fixed-term peer staff members for the work the former had performed under their so-called "short-term contracts" is a violation of the Universal Declaration on Human Rights and ILO Equal Remuneration Convention, 1951 (No. 100). Both instruments require that all workers be given equal remuneration for work of equal value. Convention No. 100 defines "remuneration" to include salary and all additional emoluments. As an international organisation the WHO is bound to uphold fundamental principles of international law and this includes the principle of equal remuneration for work of equal value. The Organization's treatment of the complainants during the period in question clearly violated this principle.

By maintaining a legal fiction – that during the period in question the complainants were mere short-term staff members during the 50 per cent of the working day that they performed the tasks under a short-term contract – and by granting them fewer benefits for the work performed thereunder than under their half-time fixed-term contracts, the WHO has been unjustly enriched. Under the Tribunal's case law, unjust enrichment is illegal and irregular.

The complainants were in law and in fact similar to other fixed-term staff members who were performing similar or equivalent duties and as a result they were entitled to all benefits, conditions of service and any other emoluments denied to them by the Organization. Although the complainants' service at the WHO between February 1996 and July 1998 was divided in half, with part of their service denoted fixed-term, and the other short-term, their true status, in fact and in law, was that of a fixed-term contract holder, similar in nature to the status held by many of their WHO colleagues. As such, the WHO's division of their employment status, into two different contract types, was an illegitimate use of a legal fiction which caused the unfair denial of a number of benefits, protections and privileges under the short-term contract, but which were accorded to the complainants for their fixed-term, part-time service. In the complainants' case, the nature of their work made it impossible to ascertain any difference between their functions and status while acting under their part-time fixed-term capacity and while acting under their short-term contracts. Under the Tribunal's case law, the reality of the working contract should control the actual, existing terms of the relationship, not the form of the written document.

Remunerating the complainants under the "short-term contracts" at a grade or step lower than that of their half-time fixed-term contracts violated Staff Rule 570. The failure to pay the complainants a pro-rata end-of-service grant upon reduction of their status from full-time to half-time in February 1996 violated Staff Rule 375 and provided another unjust enrichment to the Organization.

The complainants request the production of numerous documents relating to their contract status during the period in question. They ask the Tribunal: to order the full restoration and payment of the emoluments and benefits of which they had been wrongfully deprived between February 1996 and July 1998; to award them a pro-rata end-of-service grant pursuant to WHO Staff Rule 375; to award them 15,000 Swiss francs in costs and legal expenses; to award them damages in the amount of 50,000 francs per complainant for the serious moral and emotional injuries suffered as a result of the loss of benefits and emoluments; payment of interest on any awards of six per cent per annum from 1 February 1996 through the date such

awards are fully and finally paid; and any other relief that the Tribunal deems necessary, just and equitable.

C. The WHO submits that the complainants may not validly challenge the terms of contracts which they knowingly and freely accepted; the stability of legal relationships requires that contractual terms are inviolate.

By doing all that it could to avoid separating from service its staff members – including offering the option of half-time posts – the WHO did all that was required of it under its Rules. Although the complainants were given preferential treatment in the awarding of short-term contracts, the Organization had explained that these contracts could only be offered to them if the cost to the WHO was not more than recruiting any other short-term staff member. Thus, participation in the Pension Fund was excluded and the salary was set at step 1 in the grade.

The Organization argues that each short-term contract offered to the complainants was distinct from their fixed-term appointment, that the short-term contracts were governed by the rules applicable specifically to short-term contracts, and that the contracts offered complied with these rules. Any argument to the contrary is not supported by the Staff Rules, the terms of the contracts, or the Tribunal's case law. Their acceptance of the short-term contracts did not turn their half-time fixed-term appointment into a full-time fixed-term appointment. Staff Rule 340 excludes the payment of the dependants' allowance to short-term staff so the complainants' short-term contracts did not provide for it.

If the complainants believed their contracts to be inequitable, they could have rejected them. However, they chose freely to accept the contractual terms offered to them. Each contract referred to the appointment as a short-term appointment, issued in accordance with the conditions of employment for short-term staff. They cannot now argue that they had assumed that the remuneration under the short-term contracts would be the same as for their fixed-term contracts. By arguing that they were "in fact and in law" fixed-term staff members, the complainants are seeking a retroactive revision of their contractual situation between February 1996 and June 1998.

While the complainants always performed the same duties under their half-time fixed-term appointment, in most cases their duties under their

short-term contracts varied. And while it might have happened that a complainant performed comparable duties under both contract types, there is nothing improper in offering a contract to a staff member whose experience makes him or her suitable for the work, or in taking his or her preferences into account.

ILO Convention No. 175 is not binding on international organisations; it is only binding on States who are a party to it. Moreover, it is not relevant to the situation at the WHO: Convention No. 175 concerns the "temporary" reduction in normal working hours, but the situation at the WHO was of a lasting nature.

There was no breach of the principle of equal remuneration for work of equal value. The two types of contract confer different rights and therefore create different situations in law and in fact. There was no discrimination here; the complainants received the same treatment as their colleagues in the same situation in fact and in law.

The WHO was not "unjustly enriched" through its employment of the complainants under short-term contracts. The concept of unjust enrichment refers to the retention of money or benefits which belong to someone else, and this was not the case here.

There was no violation of Staff Rule 570. The complainants were reassigned from a full-time post to a half-time post of the same or higher grade. Since they suffered no reduction in grade, Staff Rule 570 is not applicable. That provision is also not applicable to their short-term contracts, as under those contracts they did not hold posts. Staff Rule 375 (on end-of-service grants) does not apply in the case at hand.

D. In their rejoinders the complainants refute the Organization's argument that they freely accepted the half-time post proposals. They submit that they were presented with no real alternatives and were pressured to accept the Administration's proposals. Moreover, the WHO offered no communication, counselling or explanation of the terms and conditions of the proposals and required the complainants to respond within a week.

They press their request for the production of documents, in particular for the Information Circulars issued on 21 and 28 July 1995 which allegedly explained the full consequences of the restructuring measures. They submit

that the different options were never fully explained to them so they took their decisions without a full and complete understanding of the terms, conditions, and consequences of each option. They had accepted the proposal for half-time employment on the assumption that the short-term assignments would be remunerated in keeping with their fixed-term appointment terms and conditions and they deny that they had received prior notice of the different terms and conditions which would apply to any short-term appointment. Even the Board of Appeal questioned whether the complainants had fully understood the real and practical effect that accepting the proposals would have on their financial situation. In the absence of the Administration's express statement otherwise, the complainants were reasonably entitled to assume that the short-term assignments would be offered on comparable terms as their fixed-term assignments.

The Administration's decision to restore the complainants' entitlement to the Pension Fund undermines its position and shows that the Administration intended to treat them not as short-term staff, but as fixed-term staff members affected by partial unemployment.

The complainants state that their sole interest lies in being properly remunerated for the work they performed, in accordance with their true positions as fixed-term staff members. They are not seeking to convert the nature of the contract from short-term to fixed-term, but rather they seek to uphold the intended and implied terms and conditions.

They submit that there is a difference between the terms "short-term contracts" and "short-term staff" and that it is significant for understanding how the Administration erred in applying Rule 1320. The Administration sought to treat the short-term assignments as "short-term contracts"; but such contracts are held by "short-term staff" who hold temporary positions of no tenure with the Organization. They reiterated that they were, in fact, full-time workers affected by partial unemployment as defined under the ILO Convention. Regardless of the "label" the WHO attached to their assignments, in reality they continued to perform the same or equivalent work under both their fixed-term and short-term contracts, with the only appreciable difference being the "labels" assigned and the lower step allocation and emoluments paid under the short-term assignments.

E. The WHO has submitted with its surrejoinders the two Information Circulars requested in the rejoinders. It reiterates that the complainants were duly informed why the half-time posts would be offered and each complainant was free to decide not to accept the offer of such a post. As evidence, the Organization points out that not all of the complainants had initially opted for the half-time contracts but instead some had been unsuccessful participants in a RIF exercise before they applied for a half-time post. At no point were the complainants under duress to accept the offer of a half-time post. They were also made fully aware of the implications of their choice, by the use of written communications as well as various meetings held on the subject.

The Organization provides information on the types of short-term contracts offered to each complainant as proof that the short-term contracts were often not for the same duties as the part-time, fixed-term contracts. It states that "virtually without exception" the nature, location, or level of the work differed.

Regarding the complainants' argument on the decision to allow participation in the Pension Fund, the WHO states that the Director-General's decision was taken as an exceptional measure without any legal obligation to do so. It was taken in good faith and as a gesture of goodwill to long-serving staff.

F. In further submissions the complainants state in answer to a question put by the Tribunal that they do not object to the Tribunal joining the two cases (*in re Deville and others* and *in re Gasser*).

G. In its comments the WHO says that it has no objection to any joinder of the two cases by the Tribunal.

CONSIDERATIONS

1. The case of Mrs Gasser differs in no material respect from the case of Mr Deville and others and had been, together with the latter, the subject of a single joint appeal before the Headquarters Board of Appeal. The Tribunal orders that they be joined and disposed of by a single judgment.

2. In 1995 the complainants were all General Services staff members of the WHO. At that time the Organization was experiencing serious financial difficulties. The posts occupied by the complainants were in danger of being abolished. Rather than expose its staff to the uncertainties of a RIF process, the Administration converted twenty-four posts into half-time posts and offered those interested the possibility of a fixed-term appointment at half-time. This would allow two staff members to occupy on a half-time basis a number of posts which had previously been held by only one staff member, in effect a form of "job-sharing". Some complainants accepted this arrangement immediately while others chose first to try their luck at the RIF process but when they were unsuccessful in the latter, they each applied for and obtained one of the half-time posts. The upshot was that by early 1996 each of the complainants, who had previously held a full-time fixed-term appointment, now held a half-time fixed-term appointment.

3. Over the ensuing two and a half years all of the complainants were offered, on a preferential basis, a series of short-term part-time appointments by the WHO which they carried out in the time which was now available to them because their fixed-term appointments were only at half-time. Under applicable WHO staff rules "fixed-term" appointments are, as their name implies, of limited duration but for one year or more. "Short-term" appointments are also for a limited term, but their duration is shorter than one year and may be in practice very much less.

4. The short-term contracts offered to the complainants were in every case at the lowest grade and step for the position being filled; they also did not carry with them any pension rights or allowances for family status or language proficiency. As a result when performing under the part-time short-term appointments, the complainants were being remunerated for the "short-term" part of each day's work according to a scale different from, and lower than, the scale used for the work performed (sometimes for the identical job) during that part of the day when they were working under their half-time "fixed-term" appointments.

5. This situation continued until July 1998 when, its finances having improved, the WHO restored all the complainants to their full-time fixed-term status. In August 1998 the complainants asked in writing that their eligibility to participate in the Pension Fund, in respect of their earnings under their short-term appointments up to January 1997 (pension contributions had been resumed after that time), be re-examined. In May 1999 the complainants complained about the rates of remuneration received by them under their short-term contracts and the refusal to award them dependants' allowance and "grade indemnities". No satisfactory resolution having been found, the complainants appealed to the Board of Appeal.

6. The Board of Appeal found the joint appeals to be receivable, a position not disputed by the Organization. It recommended granting full pension participation for the complainants in respect of their "short-term" contracts but further recommended the dismissal of their other claims. These recommendations were accepted by the Director-General in the decision now impugned.

7. The complainants seek payment of the sums which they say they should have received when working under their short-term appointments. They also seek damages, costs and other consequential relief.

8. The principal plea advanced by the complainants is that, because they were holders of fixed-term, half-time appointments – and therefore had status as regular staff members of the WHO – the additional work that was given to them could not be and was not, in law, the subject matter of separate short-term appointments or contracts but, on the application of general principles of international civil service law and WHO Staff Rules, was merely an extension of their fixed-term appointments.

9. They further argue that they do not conform to the definition of "part-time worker" found in the ILO Part-Time Work Convention, 1994 (No. 175). They also claim that the Organization has breached the rules requiring payment of equal remuneration for work of equal value and has enriched itself unjustly at their expense. The contractual nature of their short-term appointments was in their view simply a sham designed to mask

the true nature of their status as fixed-term staff, and the contracts themselves are invalid, having been entered into under economic duress.

10. It is this last argument which brings us to the heart of the difficulty faced by the complainants in this matter. In respect of each short-term appointment taken up by them, they entered into a written contract specifying the duration, remuneration, grade, step and other pertinent conditions applicable to them. They do not deny that they were paid exactly as stated in the contract documents. If the contracts are valid and enforceable and not in breach of any applicable staff rule or principle of international civil service law, the Tribunal has no power to reform them or to remake the bargain which the parties themselves have chosen to make.

11. Furthermore, the complainants, having taken the benefit of the short-term appointments offered to them, have a heavy burden to overcome if they are to argue successfully that the Tribunal should now treat the contracts as being null, for it is now impossible to replace the parties in the position they were in at the time the bargain was struck. They must show either that their short-term appointments violated some fundamental and overriding principle of law or that their apparent consent thereto was vitiated. They have failed to do so.

12. First, while it is unusual to find an employee working simultaneously for a single employer under two different contracts of employment, there is nothing inherently illegal about such an arrangement. Nor have the complainants pointed to any applicable staff rule which would deny the Organization the right to do what it did.

13. In fact, Staff Rule 1320 makes it quite clear that the appointment of short-term staff is exempted from the application of any other staff rule:

"1320. SHORT-TERM STAFF

The Director-General may appoint short-term staff for conference and other short-term service without regard to the provisions of other sections of the Staff Rules."

14. What of the general principles of international civil service law invoked by the complainants? Other than generalised assertions that the

Organization has acted wrongfully, they can point to no instance in the case law which can lend them any comfort. In fact, the Tribunal has consistently held that it will not interfere with the right of an organisation to manage its affairs and to settle by agreement with the members of its staff the terms of the latter's employment.

15. Thus in Judgment 1450 (*in re Kock and others*) the Tribunal upheld the right of an organisation to appoint auxiliary staff on short terms. It said:

"23. However municipal law on the grant of fixed-term contracts may vary from country to country, the fact is that in the international civil service such contracts are common and the policy is seen as a proper and even necessary method of administration. So the EPO acted unimpeachably in resorting to fixed-term contracts to get auxiliary work done and so ease the undue rigidity of its staff structure. True, especially when there is not full employment, the decision not to renew a contract on expiry may cause hardship. But that is why, in keeping with precedent, the Tribunal will in each case look to the circumstances in which the decision not to renew or not to convert to permanent appointment may have come about."

16. Similarly, in Judgment 1938 (*in re Alvarez Vigil*) the Tribunal dismissed, in the following terms, the claim of a person who had worked for many years on a series of short-term contracts:

"8. With regard to the very short periods during which he worked for the Organization under temporary advisor contracts, namely from 25 to 30 July 1982, 7 September to 4 October 1987, 12 to 22 June 1988 and 3 to 7 October 1988, the complainant provides no information which would allow him, several years after the material facts, to challenge the benefits which he received. In practice he is seeking to obtain a revision of the whole of his career from 1976 to 1996. But he himself accepted the contractual conditions offered to him. He did not challenge the decision taken in 1979 not to renew his fixed-term appointment and not to convert it into a permanent appointment. Moreover, he offers no legally valid argument to challenge the way he has been treated since 1979. His claims must therefore be dismissed ..."

17. The complainants' attempt to invoke a number of international conventions out of context and in a way which was never intended, is futile. They cite the definition given in the ILO Part-Time Work Convention to show that they are not part-time workers within the meaning of that document. They may not be; the Tribunal does not have to decide the point. The Convention itself requires the States who adhere to it to establish certain

guarantees for persons who are part-time workers as defined, and it is of no avail to show that the Convention does not apply to the case.

18. The argument based on the principle which guarantees equal remuneration for work of equal value is likewise without merit. The principle of equal remuneration is designed to prevent discrimination by employers between employees and to ensure that persons performing different work of the same or similar value shall receive equal remuneration. The Organization is right to submit that its most common application is to the classification or grading of jobs. What is perfectly clear, however, is that that principle was never intended to apply so as to give rise to a claim by an individual to be paid at the same rate for all work which he or she performs: differential rates for work performed under different conditions, such as overtime to take a common example, are not discriminatory. In the present case there is nothing improper in the WHO's paying lower rates to persons such as the complainants doing temporary work on a short-term basis.

19. The complainants also argue that their contracts are voidable on general principles of contract law. They suggest error and fraud or sham but produce no evidence which would lend any colour of right to those submissions. Their main contention on this plea is that the contracts are a nullity because they, the complainants, entered into them under duress. They were, they say, in a condition of economic fragility which gave them no choice but to accept the terms of the contracts which were offered to them. It is, of course, the case that the short-term appointments were of great economic benefit to the complainants and the fact that they had accepted a reduction of their fixed-term contracts to half-time made them eager to accept any additional source of income which might be offered. But that is not a ground for nullifying a contract. Most contracts are entered into because both parties think it is to their economic advantage to do so. Where there is great disparity in bargaining power, as is the case here, the law will impose constraints upon the more powerful. In the international civil service that is one of the functions of the staff rules, and where these are inadequate, the Tribunal will intervene to redress the balance through the application of general principles of international civil service law. But, neither the Staff Rules nor the application of those general principles have been in any

way breached by the Organization in this case. There was nothing unconscionable, quite the contrary, in the way the WHO treated the complainants and the claim for the nullity of the short-term appointment contracts entered into by them must, therefore, fail. It is noteworthy that the true source of the "economic duress" to which the complainants say that they were subjected was the fact that their full-time fixed-term contracts had been replaced by half-time fixed-term contracts, but that was a situation which they themselves accepted and which they did not contest at the time, and do not now, and the time for doing so has long since expired.

20. Furthermore, the existence and validity of the contracts is a complete bar to the complainants' plea of unjust enrichment. The doctrine of unjust enrichment finds its origins in the law of quasi-contract, and the existence of a valid contract between the parties, covering the very matters which are the subject of the claim, excludes any claim of unjust enrichment. It is likewise with the plea that the complainants suffered a reduction in grade contrary to the provisions of Staff Rule 570; quite apart from the fact that there was no reduction in grade, that rule does not exclude the possibility of a consensual reduction in grade, and the complainants entered into short-term contracts for employment in positions at lower grades than those which they occupied on a half-time basis.

21. In a subsidiary claim, the complainants ask to be given a *pro rata* end-of-service grant pursuant to Staff Rule 375. That grant is payable to a staff member holding a fixed-term appointment whose appointment is not renewed after completing ten years of service. That is not what happened to the complainants when each of them was reassigned from a full-time to a half-time post in early 1996. Quite apart from the fact that many of the complainants had not completed ten years' service, they were each offered a half-time post, which they accepted, and they therefore continued in service with the WHO as staff members. Thus, this claim also fails.

22. Before concluding, there are two matters which the Tribunal must take up. First, the complainants have asked the Tribunal to order the WHO to produce a vast array of documents relating to its hiring practices generally in an apparent attempt to demonstrate that the Organization has acted

illegally or unfairly in other cases. This is how they describe the requested documents:

"Copies of all contracts or appointments, short-term, fixed-term, or otherwise, granted to all of the Conference and General Service staff members (including without limitation the Complainants, external personnel, external enterprises, etc.) during the period from February 1996 and July 1998."

23. The Tribunal will not countenance this type of "fishing expedition". It can only deal with complaints filed in accordance with its Statute and the Rules, and the materials presently before it are fully adequate to allow it to dispose of the present case; it will not embark on a general inquiry extending beyond the complaint actually before it.

24. Finally, the Tribunal has dealt with this whole matter on the basis that the complaints are receivable since the Organization has not claimed otherwise and the Board of Appeal found the appeal to be so. The Tribunal, however, does entertain considerable doubt on this point, and it is entitled on its own motion to hold that a complaint is irreceivable. But since it concludes for the reasons stated that the complaints before it are, in any event, without merit, it is not necessary to dwell further on the point.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet
CATHERINE COMTET



*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Geiger

Judgment No. 2098

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Roland Geiger against the International Labour Organization (ILO) on 21 November 2000 and corrected on 11 January 2001, the ILO's reply of 10 April, the complainant's rejoinder of 23 June and the Organization's surrejoinder of 18 July 2001;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss citizen who was born in 1941, joined the staff of the International Labour Office, the ILO's secretariat, in 1965 on a G.4 post in the Finance Department. In 1968 he was given an appointment without limit of time. He rose through all the grades and steps of the General Services category in that department and in 1984 reached the top grade: G.7, step 12.

Citing "serious medical problems" the complainant informed the Administration by a letter of 8 October 1997 that he was prepared to accept a termination by mutual agreement as from 31 May 1998. After various formalities the Chief of the Personnel Planning and Career Development

Branch informed him in a letter of 8 July 1998 that his termination would take effect as from 31 July 1998. Pursuant to Article 11.16 of the Staff Regulations he would be paid an indemnity equal to nine months' salary. He was to sign and return the appended copy of the letter which constituted "full and final settlement" of the conditions of his separation.

On 14 January 1999 the complainant wrote to the Director of the Personnel Department claiming an indemnity equal to eighteen months' salary. Having noted that his personal file was far from complete, he requested in a fax message of 7 May all documents concerning him as from January 1998. The Director of Personnel replied on 25 May that everything that should be in his file was there. In response to several phone calls from the complainant asking for a signed copy of the agreement terminating his appointment, she sent him a letter on 21 September stating that the original should be in his possession and that a signed copy of it had certainly been put in his personal file, but was no longer there.

On 15 November 1999 the complainant sent to the new Director of Personnel a medical certificate stating that in July 1998 he had probably been incapable of grasping the consequences of his actions. In his reply of 17 January 2000 the Director pointed out that the complainant had failed to prove that he had not consented to it freely and the agreement had become final on expiry of the time limit for appeal provided for in Article 13.2 of the Staff Regulations. The complainant wrote back on 20 June asking for a signed copy of the agreement. In a letter of 25 August 2000 the Director informed him that the matter was closed. The complainant is challenging a decision of 31 July 1998 which he alleges was notified to him on 25 August 2000.

B. The complainant denies having signed an agreement for the termination of his appointment. He argues that he is entitled to compensation because there is no proof that such an agreement was ever concluded. Besides, he was on sick leave at the time when it was supposedly signed.

He claims reinstatement – in which event he would reimburse the amount already paid to him – or an additional indemnity equal to nine months' salary: 90,000 Swiss francs.

C. In its reply the ILO submits that the complaint is irreceivable because the complainant should have impugned the decision of 17 January 2000 – within ninety days of its notification. That is the only decision that may be construed as final within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. The letter of 25 August was a mere confirmation and could set off no new time limit.

Returning to the facts that prompted the dispute the Organization observes that, throughout his career, the complainant's performance was satisfactory until the late 1980s, when health troubles started to affect the quality of his work. From then onwards his health got worse. His supervisor supported his request for an agreed termination because his ailments were affecting his work not only in the Office but in his dealings outside, with banks for example.

The ILO contends that he did agree to the termination of his appointment on 14 July 1998. It maintains that he does have the original of the agreement. The Office is unable to provide him with the signed copy since it is missing from his personal file, and suspects that he is responsible for its disappearance. Even supposing he never signed the agreement, there is no denying that the consent was mutual as it was he who originally proposed an agreed termination. The agreement need not have been in writing – although in fact it was – and since the parties had consented to it freely only the legal incapacity of one of them could have invalidated it. The evidence submitted by the complainant affords no proof that his judgment was impaired at the time of signing. Lastly, when he agreed to the indemnity he knew that it was not the maximum the Director-General could have granted. He may not now go back on his acceptance simply because he later changed his mind.

D. In his rejoinder the complainant alleges that many of the Organization's points in its reply are "inaccurate and misleading". He contends that he was always commended on his performance. He underwent no end-of-service medical examination although, he says, the ILO had a duty to ensure that he did. Moreover, for eight years he had had no performance appraisal. He attributes his illness to professional harassment on the part of the ILO. He seeks hearings.

E. In its surjoinder the ILO observes that the complainant has submitted no evidence on which to refute the position it held in its reply. His "new claims" concerning harassment and the absence of performance reports – for three years and not eight as he asserts – are irreceivable under Article VII(1) of the Tribunal's Statute. It sees no reason to hold hearings.

CONSIDERATIONS

1. The complainant joined the staff of the International Labour Office in 1965 and served in the Finance Department. His work was always found satisfactory until the late 1980s, when health problems began to affect his attendance and performance.

On 8 October 1997 the complainant informed the Administration that he was ready to accept an agreed termination of appointment in view of his "serious medical problems", in the interests of the "greater efficiency ... of the office". He proposed leaving on 31 May 1998, the date as from which he would be entitled to an early retirement pension.

Asked for its opinion by the Administration, the Medical Service advised against keeping him on.

Since the complainant's case was covered by none of the criteria for agreed termination provided for in the rules, the ILO decided to extend the conditions justifying termination to accommodate his case. After discussing the matter with him, the Chief of the Personnel Planning and Career Development Branch wrote to him on 8 July 1998 setting out the procedure and conditions of his termination. A copy of that letter, which the complainant does not challenge, has been produced by the Organization. The letter informed him that:

"Your appointment with the International Labour Office will be terminated by agreement on 31 July 1998 in accordance with Article 11.16 of the Staff Regulations.

... upon leaving the Office you will receive an indemnity equal to 9 (nine) months of the remuneration specified in Article 3.1(d) of the Staff Regulations and repayment of your accrued annual leave (Article 7.5(b) of the Regulations).

...

I should be grateful if, in order to confirm your agreement, you would sign and return the attached copy of this letter which shall constitute full and final

settlement of the conditions of your separation from the Office, without reservation or qualification by either party."

The ILO contends, and the complainant denies, that it sent him the letter and that he duly signed and returned the copy of it.

In any event, his appointment was terminated on 31 July 1998. It is neither alleged nor established that he raised any objection or denied having assented.

It would appear that on 11 January 1999 the complainant went to see the Director of Personnel of his own accord saying that he had signed the termination agreement while he was on certified sick leave and that he wanted to renegotiate it in order to obtain more favourable terms.

In a letter of 14 January 1999 he asked for "an 18 month [indemnity] like everybody else".

Having consulted the Medical Service, the Director of Personnel informed the complainant in a letter of 25 March 1999 that his allegation of incapacity to grasp its meaning when he signed the agreement on 14 July 1998 was unacceptable. She advised him to write a letter stating the reasons for his objection to the validity of the agreement, pointing out that it was in his interest to supply medical proof of his incapacity.

In a letter of 25 May 1999 she repeated her advice: he should provide proof that at the time of negotiating and concluding the agreement, i.e. between April 1998 and 14 July 1998 (when it was signed), he was suffering from so serious an illness that he was not in a position to take such an important decision or grasp its consequences.

In answer to several requests from the complainant for a signed copy of the agreement, the Director of Personnel told him on 21 September 1999 that the original should normally be in his possession. The copy he signed had been put in his personal file – as he must have seen when he consulted it – but she had just realised that it was no longer there. She nonetheless certified that it had been and that the complainant had signed it on 14 July 1998.

2. After a fruitless exchange of letters with the Director of Personnel, the complainant filed a complaint with the Tribunal on 21 November 2000. According to the complaint form, he is impugning a decision of 31 July

1998 which was supposedly notified to him on 25 August 2000. In that letter the new Director of the Personnel Department – which had by then become the Human Resources Development Department – informed the complainant that the case was closed but that if he wished to pursue matters further the competent body was the Tribunal. The complainant claims reinstatement – in which case he would be prepared to reimburse what he has already been paid – or an additional indemnity equal to nine months' salary: 90,000 Swiss francs. He alleges that his appointment was terminated unilaterally.

The Organization seeks the dismissal of the complaint as irreceivable. It asserts that its final decision was given in its letter of 17 January 2000; the later ones merely confirmed it. Having been lodged on 21 November 2000, the complaint is therefore outside the statutory ninety-day time limit. On the merits and subsidiarily it argues that the complaint is unfounded. The termination of his appointment was properly concluded in a written agreement. Even if that had not been the case, a written agreement was not an obligation and both parties manifested their agreement when the termination took effect.

In his rejoinder the complainant submits that his performance has always been found satisfactory and that the Organization did not comply with procedure in terminating his appointment. He pleads professional harassment, alleging that the ILO is "responsible for [his] illness", but makes no formal claim in this connection. The facts and pleas that the Organization presses in its surrejoinder are in any event immaterial.

Procedure

3. After the written pleadings the complainant applied for leave to enter a further brief. The Tribunal sees no reason to allow the brief since it would raise an issue that has no bearing on the outcome of the case.

Nor is there any reason to allow the application for hearings, both the parties having had ample opportunity to state their positions on the main issues.

Receivability

4. Even supposing there were a new claim in the rejoinder – to a finding of illness attributable to harassment – it would in any case be irreceivable for failure to exhaust the internal means of redress.

5. The receivability of the complaint would appear to be doubtful on several counts.

Had he wished to appeal directly to the Tribunal against the termination of his appointment, the complainant had the statutory ninety days in which to do so. Assuming that the decision was duly notified to him in July 1998, he would be time barred.

Even in the event of the termination being unilateral, he was bound to impugn it immediately, within the prescribed time limit, which started from the day on which it was notified to him. In this hypothesis too he would be time barred.

What is more, the letters the Administration sent after 31 July 1998 do not constitute decisions that can set off a new time limit.

However, the Tribunal need not rule on the ILO's objections to receivability, having no doubts about the outcome as to the merits.

The merits

6. In essence the complainant is arguing that the ILO ought to have produced written proof that there was an agreement terminating his appointment. There being no signed copy to disclose, it is unable to do so. That could indicate that his appointment was terminated unilaterally. It must be noted, however, that the complainant pleads both that the ILO could not produce a signed copy of the agreement and that he did not sign it.

The ILO maintains that the original was in the complainant's possession and that a copy bearing his signature was placed in his personal file but disappeared after the complainant had consulted the file. The Organization is adamant that there was an agreement and that it was concluded in writing. In support it produces numerous items of evidence and

cites in particular the fact that it was put into effect by both parties with no objection from the complainant.

The reasoning is sound.

The facts show beyond all doubt that the complainant accepted the ILO's offer. His attitude, particularly towards the Director of Personnel, and his failure to respond to the written confirmation sent to him more than once are tantamount to an admission that he did agree to the termination of his appointment. This is further borne out by the fact that he raised no objection when the agreement was implemented. The concurrence and reciprocity between the parties would in itself constitute sufficient evidence that a contract existed even in the absence of proof of a written agreement.

7. The complainant alleges that at the time of concluding the agreement his judgment was impaired.

He has produced a medical certificate attesting to pathologies "with severe anxiety, in all likelihood leading to an incapacity to grasp the consequences of his acts, particularly in July 1998". The ILO finds the certificate inconclusive, and it is right on that score. Drawn up by his general practitioner, it is not compelling and, more importantly, makes no mention of any impairment of his judgment at the time when he supposedly signed the agreement. Furthermore, it was the complainant himself who mooted the agreed termination and before it took effect there were protracted negotiations from October 1997. He therefore had ample time, despite "severe anxiety", to realise what the consequences of such a termination would be and act accordingly. He has produced no other evidence indicating that his judgment was impaired at that time. Indeed, he did not plead lack of judgment until it occurred to him to renegotiate the terms of his separation.

The plea fails.

8. The complainant also appears to object that the Organization terminated his employment while he was on sick leave.

Although the Tribunal held in Judgment 938 (*in re Hill No. 2*) that a staff member cannot be separated while on sick leave, it later pointed out that its ruling was to be seen in context and could not be applied in any

circumstances whatever (see Judgment 1494, *in re Mossu*, under 6). The rule being intended to protect the staff member, it cannot be applied where the termination is the subject of an agreement, particularly when it has been mooted by the staff member concerned as is the case here.

The plea therefore fails.

9. When the complainant asked to renegotiate the terms of the agreement he pleaded breach of equal treatment on the grounds that other staff members had been better treated than he. However, he has produced no evidence of any other official faring better in a similar case.

The complainant has not put forward such a plea in this complaint. He has also failed to show that there are instances of review of such agreements which he might rely on.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

NINETY-SECOND SESSION

In re Infante

Judgment No. 2099

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Joaquín Infante against the European Patent Organisation (EPO) on 23 September 2000 and corrected on 6 November 2000, the EPO's reply of 29 January 2001, the complainant's rejoinder of 31 March, and the Organisation's surrejoinder of 20 June 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is of Spanish nationality and was born in 1955. He joined the staff of the European Patent Office, secretariat of the EPO, on 1 May 1989 as a formalities officer at grade B4, and was assigned to Directorate-General 2 (DG2) in Munich.

Article 45 of the Service Regulations provides for unpaid leave "on personal grounds". The first two paragraphs state:

- "(1) A permanent employee may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds.
- (2) ... the duration of such leave shall not exceed one year. Such leave may be extended for two further periods of not more than one year each."

On 29 July 1996 the complainant applied for unpaid leave with effect from 15 September 1996 in order to move to Spain because of family circumstances. In a letter of 1 August 1996 the Director of Personnel Management informed him that his unpaid leave was authorised for one year, that no further extension would be possible and that he could return to his position of formalities officer on 15 September 1997. During his leave he was employed by the Office for Harmonization in the Internal Market (OHIM) in Alicante.

Prior to the expiry of his leave the complainant sought a one-year extension. His request was refused. He did not resume work in Munich on 15 September 1997. In a fax of 19 September he said he wished to start back on 29 September. The EPO did not agree to the deferral. In a letter of 29 September, citing Circular No. 242 of 11 December 1996, he asked for additional unpaid leave for one month on "private grounds". He said that in the event of that leave not being possible he wished to resign with retroactive effect from 15 September 1997. His resignation was accepted the same day.

On 13 October and 4 December 1997 he wrote to the President of the Office expressing the wish to return to his post. He received no reply. By a letter of 12 December 1997 he filed an internal appeal against the implied rejection of his request. The matter went to the Appeals Committee. By a letter of 18 December 1998 the Organisation offered him a retroactive extension of his leave from 15 September 1997 until 31 March 1999 on the understanding that he would withdraw his internal appeal. He accepted the offer and was due to return to the EPO on 6 April. On 18 March he requested an extension to 1 July 1999. That request was denied, as was a request for "one additional" month's leave contained in a fax sent to the Organisation on 30 March 1999.

The Vice-President in charge of Administration told him in a letter of 25 May 1999 that his absence from 6 April was unauthorised and that disciplinary proceedings were being initiated against him. He also said that during such absence the complainant was covered by the Office's social security schemes and would have to pay back both the employee's and the employer's part of the contributions that the Office was paying on his behalf.

In its report of 27 August 1999 the Disciplinary Committee unanimously recommended dismissing the complainant. It also took the view that the complainant was liable for the totality of the contributions paid on his behalf by the Office during his unauthorised absence. The President endorsed the Committee's opinion. On 21 September the Director of Personnel Management notified the complainant of the President's decision to dismiss him from 1 October 1999.

The complainant filed an internal appeal against that decision on 13 October, claiming reinstatement. In its report of 14 April 2000 the Appeals Committee found that dismissal was justified as was the reimbursement of the social security contributions. It was of the opinion however that the complainant was under no obligation to pay pension contributions during his unauthorised absence. In a decision of 4 July 2000, which the complainant impugns, the President upheld his dismissal. He confirmed that the complainant had to reimburse the social security payments at issue and that he would lose accrual of entitlements under the pension scheme unless he paid the relevant amount relating to the employee's and employer's contributions by 1 August 2000.

B. The complainant notes that his dismissal was based on the "repeated infringement" of absence without permission. The first "infringement" was however the subject of his first internal appeal which was resolved in his favour by the extension of his leave. His dismissal was thus based on a fact that had been rendered "extinct". He questions the legality of taking the first alleged infringement into account in the subsequent internal proceeding.

He contends that the Disciplinary Committee and Appeals Committee disregarded essential facts. Although the Organisation affirms otherwise, he did provide valid reasons for wanting his leave extended. There were factors that hindered him from acting "freely and in time". His presence was required in Spain because of health problems of close relatives but the EPO repeatedly ignored the "social" reasons preventing him from leaving Spain. He rebuts any suggestion that he showed lack of interest in returning to Munich; it is clear from his correspondence with the Office that it was his "firm intention to return". He draws attention to

Circular 242 which says that leave on "purely private grounds" can be granted "once within a three-year period". He says he was "repeatedly" deprived of his right to be granted leave for one month under that circular, and yet it would have facilitated his return. Likewise, he was denied the benefit of Article 63, relating to unauthorised absence, inasmuch as by the terms of that article his ten-day supposed absence in September 1997 could have been deducted from his annual leave.

Moreover, he claims that the EPO has applied Article 45 of the Service Regulations in an arbitrary manner. It discriminated against him. By way of evidence, he cites the case of another EPO colleague who, like him, took unpaid leave but was allowed two extensions.

The complainant claims the quashing of the impugned decision and reinstatement in his post with retroactive effect to 15 September 1997, with the corresponding increase in salary step. He also seeks an opinion from the Tribunal as to whether he is obliged to pay back social security contributions to the EPO, particularly since in a letter of 31 May 1999 he informed the Office that he was covered by a different scheme and did not want it to pay any contributions on his behalf. He wants his pension rights restored from 15 September 1997 and claims moral damages.

C. The Organisation contends in its reply that the complaint is irreceivable in part and devoid of merit. It points out that in his internal appeal the complainant claimed reinstatement from 1 October 1999, the date at which he ceased to be a staff member. He cannot now claim reinstatement from September 1997 for by accepting the Organisation's offer to extend his unpaid leave to 31 March 1999 he remained a staff member, albeit on non-active status. His claim to reinstatement from September 1997 therefore constitutes an unacceptable extension of his appeal, and as such is irreceivable. He did not ask for moral damages in his internal appeal and so that claim too is irreceivable for failure to exhaust internal remedies.

Contrary to what the complainant appears to suggest, the Organisation did not violate the principle of *non bis in idem*. The Disciplinary Committee was entitled to take the complainant's overall conduct into

account and to recommend dismissal for his having "twice failed" to meet his obligation to resume work at the EPO.

The Organisation states that Article 45 was properly applied. It is clear from the wording of that article that the granting of the initial unpaid leave and any subsequent extension falls within the discretionary authority of the President of the Office. The complainant's allegation of discrimination is unfounded; his colleague and he were not in like situation. In the interests of the smooth running of the Office the EPO could not wait indefinitely for the complainant to come to a decision. Nor did he have any entitlement to a further month's leave on "purely private grounds". When he asked for additional leave on 30 March 1999 he had already benefited from 30.5 months' unpaid leave – a longer period than that allowed in the circular he refers to.

It contests the complainant's allegation that the Disciplinary Committee and Appeals Committee came to erroneous conclusions by disregarding essential facts. The fault lay with the complainant inasmuch as he did not unequivocally show his resolve to resume work in Munich. Instead, he repeatedly requested extensions of his unpaid leave and did not resume work when he was expected to do so. His conduct showed indecision and lack of reliability which "irretrievably destroyed" the confidence the Organisation had placed in him.

With regard to contributions to the social security schemes the EPO takes the view that given its duty of care, it was obliged under the Service Regulations to ensure that the complainant was covered by the schemes while on unauthorised absence. Only the complainant's resignation could have released it from that obligation.

D. In his rejoinder the complainant presses his pleas. By no means can his requests for one month's additional leave be construed as lack of interest in taking up work again at the EPO. Depending on a favourable outcome of his personal difficulties such leave would have given him an opportunity to resume his duties. If his conduct showed evidence of indecision it was because of the pressures of his personal and social circumstances. By applying the relevant rules in an arbitrary manner the

Organisation deprived him of his rights and itself hampered his return to Munich. It is thus liable for the moral injury he suffered.

He believes that under the wording of Article 45(2) he is entitled to up to thirty-six months of unpaid leave, as well as a one-month period as leave on "purely private grounds" under Circular 242.

E. In its surrejoinder the Organisation maintains that it did take the complainant's social situation into account as evidenced by the fact that it allowed him an extension of his leave to 31 March 1999. It notes that the complainant seems to want the Tribunal to rule that it had violated his alleged right to an extension of his unpaid leave, even though he clearly had no wish to return to work at the EPO. The complainant, it argues, was not automatically entitled to the three years of leave mentioned in Article 45(2). The Organisation's power of discretion was properly exercised and he was dismissed because he had twice failed to resume work. It disclaims any liability for moral damages.

CONSIDERATIONS

1. The complainant requested and was granted unpaid leave on personal grounds for one year - from 15 September 1996 until 14 September 1997 - under Article 45 of the Service Regulations of the European Patent Office so that his wife could look after her ailing mother. During his leave he was working for the Office for Harmonization in the Internal Market (OHIM) in Alicante, Spain.

2. On 16 July 1997 the complainant applied for an extension of his unpaid leave for another period of one year, basing his application on Article 45(2) of the Service Regulations which states that "the duration of [unpaid leave on personal grounds] shall not exceed one year. Such leave may be extended for two further periods of not more than one year each".

3. In his reply of 28 July 1997 the Director of Personnel Management reaffirmed what he had said in his letter of 1 August 1996

when he approved the first request i.e. that no extension to the period already granted was possible. He asked the complainant whether he wished to return to his position of formalities officer on 15 September 1997 or resign.

4. The complainant did not return to work on 15 September. Instead, on 19 September 1997 he sent a faxed letter to the EPO stating that he had felt unable to take a decision in time with respect to his possible return to his previous post in Munich. Aware that his unpaid leave had expired, he asked if he could start later, if possible not before 29 September 1997 since "some days would be absolutely necessary in order to arrange obvious preparations".

5. His request for a postponement of his return was refused and he was told that his failure to report for duty on 15 September was being interpreted as a wish not to return to the Office. He was then asked to submit a letter of resignation.

6. The complainant forthwith filed his resignation wanting it to take effect on 15 September 1997, the date on which his unpaid leave had expired. It was accepted the same day.

7. On 13 October and 4 December 1997 he asked the President of the Office to allow him to return to his previous post. He received no reply. He wrote again on 12 December asking that his letter be treated as an internal appeal against the implied rejection of his request to return to his post. By a letter of 16 December 1997 he was informed that since his resignation had become effective on 15 September 1997 he could no longer resume his previous duties. This was reiterated in a further letter of 9 March 1998 in which he was informed that the President had referred the matter to the Appeals Committee for an opinion.

8. Following an exchange of correspondence between the complainant and the Administration, on 18 December 1998 the complainant was offered, conditional upon withdrawal of his internal appeal, a retroactive extension of leave on personal grounds. It was to end

on 31 March 1999. It was also a condition that he should refund to the Office the sums received in respect of his pension contributions and severance grant in October 1997, plus interest. He accepted the offer on 15 January 1999. It was later agreed that he would resume work on 6 April 1999.

9. Due to a change in his personal circumstances, the complainant explained in March 1999 that he could not start on 6 April. He sought a three-month extension of his leave or, failing that, one additional month. This request was denied and he was again asked in a letter of 8 April to submit his resignation as soon as possible.

10. This letter having remained unanswered, the Vice-President in charge of Administration informed the complainant in a letter of 25 May 1999 that his absence since 6 April was unauthorised. Accordingly, disciplinary proceedings would be initiated against him. He was reminded that during such absence, he was covered by the EPO's social security schemes and that, pursuant to Article 25 of the Service Regulations, he would be liable to make good in full the employee's and employer's part of the contributions the Office had been paying on his behalf. However, the President of the Office was prepared to withdraw the disciplinary procedure on the double condition that he resign in accordance with Article 51(1) of the Service Regulations and make good the contributions referred to.

11. The Disciplinary Committee unanimously found on 27 August 1999 that it was appropriate to dismiss the complainant because he had "twice infringed" Article 63 of the Service Regulations. Article 63 provides that "Except in case of sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior ...". Furthermore, the Committee considered it justified that he should have to refund the contributions that the Office made on his behalf to the social security system during his unauthorised absence.

12. By a letter of 8 September 1999, the Director of Personnel Management informed the complainant that the President intended to

follow the Disciplinary Committee's opinion and that his decision would take effect on 1 October 1999. However, before the decision became final the complainant would be given the opportunity to be heard and could submit any comments he wished to make.

13. In comments submitted on 16 September 1999, the complainant asked if the President would reconsider the facts and reinstate him in his previous post.

14. By a letter dated 21 September the Director of Personnel Management informed the complainant of the President's decision to dismiss him with effect from 1 October and asked him to reimburse to the EPO the contributions it had made on his behalf to the social security system.

15. The complainant appealed against that decision on 13 October 1999.

16. In its opinion of 14 April 2000, the Appeals Committee unanimously recommended that "the appeal against dismissal and recovery of social security contributions be dismissed" and that "the appeal against the recovery of pension contributions be allowed to the extent set out in this opinion".

17. In a letter of 4 July 2000 the President informed the complainant that he had decided to adopt the findings and recommendations of the Appeals Committee on those issues. He told him that the accrual of entitlements under the Pension Scheme Regulations was dependent on him having paid both the employee's and the employer's contributions and that the relevant accrual of rights would be lost if he had not paid the appropriate amount by 1 August 2000 at the latest.

18. The complainant challenges that decision and asks the Tribunal to quash it. He seeks reinstatement with effect from 15 September 1997, with the corresponding within-grade step and pension rights as from that date; and an award of moral damages.

19. The complainant disputes the alleged "repeated infringement" of absence without permission and charges the Administration with exercising its discretion regarding in particular his requests for leave extensions, in an arbitrary and discriminatory way. He repeatedly stresses that the EPO has overlooked essential facts, not only concerning the application of the regulations but also regarding the gravity of his personal circumstances that he has constantly explained.

20. He asks the Tribunal to consider whether, in the light of the circumstances, he is liable to make good the contributions made by the Office on his behalf to the social security schemes.

21. He accuses the Organisation of causing him serious moral injury by informing the OHIM Administration of the disciplinary proceedings against him and the intention to dismiss him.

22. Lastly, he contends that the Organisation has caused "serious moral (educational) damages" to his children by its refusal to allow him to return to Munich.

23. The Organisation argues that the complaint is unfounded; that the granting of unpaid leave is a discretionary matter for the EPO; that the complainant did not honour his commitments to resume work on the dates agreed upon; and that it is not liable for the alleged moral injury he has suffered.

24. The Organisation's decision to dismiss the complainant was mainly based on the fact that he twice failed to return to work upon the expiration of unpaid leave without giving reasons that were sufficient to justify an exception being made to the applicable rules.

25. A close examination of the facts shows that his first application for unpaid leave on personal grounds was granted for the period from 15 September 1996 until 14 September 1997 based on Article 45(1) of the Service Regulations. The letter of 1 August 1996 from the Director of Personnel Management granting authorisation explicitly stated that the

one-year period could not be extended. However, the Organisation granted the complainant a retroactive extension of his leave until 31 March 1999.

26. At this stage, the complainant had already been granted 30.5 months of unpaid leave on personal grounds.

27. The Tribunal considers that in twice refusing to grant the complainant extensions of his unpaid leave under the prevailing rules (and with no justification having been provided by him to warrant an exception being made) the Organisation properly exercised its discretion.

28. The Tribunal will not review the substance of discretionary administrative decisions, but it does have the power to review the process leading to such decisions and to look into questions such as abuse of authority, incomplete consideration of the facts or failure to respect elementary principles of justice. (See for example Judgment 1729, *in re Sardo Infirri*, under 10.)

29. When a discretionary decision has been taken, the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. (See for example Judgment 1969, *in re Wacker*, under 7, and Judgment 525, *in re Hakin*, under 4.)

The complainant having failed to prove the existence of any of the aforementioned circumstances, the Tribunal will not substitute its view for that of the President of the Office.

30. In citing the case of a colleague who was granted by the Organisation two extensions of her leave, the complainant erred, for the facts and circumstances of each case differ.

31. Having regard to the facts of the case there are no grounds for the complainant's allegation that the Organisation's decision to refuse to extend his leave was arbitrary and discriminatory. Accordingly, there is

no basis for quashing the impugned decision of the President to dismiss the complainant.

32. As for the complainant's claim for reinstatement, it must be borne in mind that, after he resigned with effect from 15 September 1997, he twice requested to return to his previous post – on 13 October and 4 December 1997. By a letter of 16 December 1997, he was reminded that his resignation had become effective on 15 September and a return was no longer possible.

33. However, an agreement ensued which extended his leave retroactively from 15 September 1997 until 31 March 1999. In effect, his employment at the EPO had not been interrupted even though he was on unpaid leave.

34. As the complainant stated himself he had been a permanent staff member of the OHIM from June 1998 to 31 March 1999, during which time he was still a staff member of the EPO, although on leave. It was only from 1 October 1999, the date of his dismissal, that the complainant ceased to be an employee of the EPO. This being so, his claim for reinstatement is receivable only from 1 October 1999.

35. The Organisation, however, has stated that it was the complainant's conduct in not honouring his commitments, his indecisiveness and lack of reliability, and the resulting "irretrievable breakdown of the relation of confidence" which made his reintegration impossible.

36. As regards entitlements, since the complainant remained an employee of the Organisation after 15 September 1997, the following ruling applies: "An official who is granted leave for any reason remains bound by all professional obligations but one – for that is what leave means – the performance of duties." (See Judgment 1363, *in re Popineau* Nos. 6, 7 and 8, under 25.)

37. As an employee, he was entitled to enjoy the protection of the EPO's social security schemes set in place by the Collective Insurance Contract, i.e. sickness insurance, permanent invalidity, death. Under the Service Regulations, the EPO is obliged to guarantee this cover even when the employee is on unauthorised absence, otherwise the protective cover becomes interrupted. Hence, the Office has a right to demand that the complainant reimburses the contributions it has made on his behalf.

38. However, as regards pension rights, since the complainant lost his right to claim his salary during the period of unauthorised absence, there was no obligation on his part to make pension contributions. Accrual of entitlements under the Pension Scheme Regulations would be subject to the complainant having paid contributions.

39. With respect to the claim for moral damages, since it was not included in the complainant's claim before the Appeals Committee, it is irreceivable under Article VII(1) of the Tribunal's Statute.

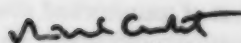
DECISION

For the above reasons,

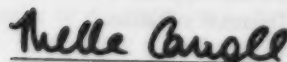
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

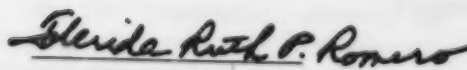
Delivered in public in Geneva on 30 January 2002.



MICHEL GENTOT

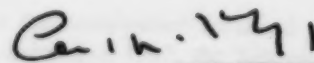


MELLA CARROLL



FLORIDA RUTH P. ROMERO





CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative*

NINETY-SECOND SESSION

In re Guastavi (No. 2)

Judgment No. 2100

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs Adelina Guastavi against the International Training Centre of the International Labour Organization (ILO) on 16 February 2001, the Centre's reply of 27 April, the complainant's rejoinder of 6 June and the Centre's surrejoinder of 18 July 2001;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian born in 1946, joined the staff of the ILO's International Training Centre at Turin in 1975. In December 1994 she was put in charge of the Research and Training Material Development Section and promoted to grade P.4. The Centre decided to set up a Distance Education and Learning Technologies Applications (DELTA) Programme, which was to include the Section, managed by the complainant, and in August 1998 it advertised the post of Chief of the Programme at grade P.5, specifying the duties involved and the qualifications required. The complainant applied on 22 October 1998. She was called up for an interview

on 16 September 1999 with a group of officials appointed by the Director of the Centre. The Director's decision to fill the post by the transfer of a P.5 official – who had not applied for the post – was notified to the complainant on 28 January 2000 and published on 31 January.

The complainant had written on 10 December 1999 to her two supervisors – the Chief of the Training Support Service and the Director of the Training Department – objecting to the way staff were managed in general and the way she had been treated in particular. She had a meeting with her supervisors on 14 December, and in a minute of 21 December she put to them some questions about the organisation of her Section and the future DELTA Programme. Among other things she asked what was preventing the "selection panel" from disclosing the results of the interviews for the post of Chief of the Programme. Furthermore, she observed that their negative comments about her performance, made during the meeting of 14 December, had never been made in performance reports, including one they had signed in May 1999. They were, she said, part of the harassment she had been subjected to constantly since her election to the Chair of the Staff Union Committee of the Centre in 1997. She concluded that she had been treated unfairly and noted that unless matters were set right she would go to the Tribunal. In his reply of 31 January 2000 the Director of the Training Department said that his action had been guided solely by considerations that had to do with her professional performance and competence.

In February 2000 the complainant was transferred to the post of Senior Programme Officer, at grade P.4, in the DELTA Programme. In a minute of 14 February 2000 she asked the Director of the Centre to state the reasons for the rejection of her application for the post of Chief of the Programme and to let her have "the evaluation criteria and results of the panel's report". In his reply of 13 March the Director explained the criteria and procedure that had been applied, specifying that his decision had been taken in the "usual way", prescribed in Article 1.2(b) of the Centre's Staff Regulations for filling posts of grade P.5 and above. In a minute of 12 April the complainant again asked for information and expressed surprise that, having opted at first for the competition procedure, the Director would in the end

appoint directly an official who had not applied for the post. In a minute of 17 April the Director invited her to refer to his minute of 13 March.

In June and July 2000 the complainant wrote several times to the Administration of the Centre, objecting to remarks made by her colleagues, particularly in the Staff Union. In her submission they amounted to psychological harassment. She asked for an inquiry. By a minute of 14 September the Chief Personnel Officer replied that the Administration could not interfere in Staff Union affairs and that the other incidents had already been looked into carefully. Deeming an inquiry unnecessary, he rejected her request.

On 12 October 2000 the complainant filed an internal complaint under Article 12.2 of the Staff Regulations. She objected to the Director's minute of 17 April 2000 replying to her request for information about the competition, and to the Chief Personnel Officer's minute of 14 September 2000 refusing to hold an inquiry. In support of her allegations of harassment she cited examples of what she considered to be the more significant incidents.

By a minute of 8 December 2000, the impugned decision, the Deputy Director of the Centre rejected the internal complaint on the Director's behalf on the grounds that the minute of 17 April merely referred to the one of 13 March, which she had not challenged within the prescribed time limit. He observed that no intention of harassment could be inferred from the incidents she cited. Indeed, two of them involved "normal Union activities", in which the Administration could not interfere. He suggested keeping a confidential file over a period of six months in which would be noted any incidents the complainant thought might be "part of a plan to harm [her]", as well as the outcome of any inquiries by the Administration. The complainant took no action on the proposal.

B. The complainant alleges that the Centre is in breach of Article 1.2 and Annex H of the Staff Regulations. Under those provisions the Director of the Centre may fill a vacancy either by competition or by direct appointment. He may not organise a competition and then directly appoint someone who has not applied for the post. But he did, so the Centre has committed an abuse of authority. It has also impaired her right, recognised

by the case law, to have her application considered in good faith and in keeping with the fundamental principles of fair and open competition. Furthermore, the refusal of her request for information about the competition was in breach of the Selection Committee's rules of procedure and the Centre's duty to keep her informed.

She asserts that the personal and libellous attacks against her since 1997 seriously harmed her good name and played a part in the rejection of her application. The Administration's lack of response and its refusal to carry out an inquiry amount to indirect support for the culprits. She is surprised that libellous statements should be described as "normal Union activities". She sees the impugned decision – and the significant reduction in her responsibilities as a result of the transfer to her present post – as a hidden disciplinary sanction or even as reprisals for her union activities.

As a preliminary claim, she asks the Tribunal to order the Centre to disclose to her the selection criteria, the "panel's" report and the various documents pertaining to the assessment of the competition tests. Her main claims are to recognition that the decision of 31 January 2000 appointing the Chief of the DELTA Programme is unlawful, though she does not seek the quashing of the appointment; the opening of an inquiry to establish the facts about the psychological harassment; and compensation for professional and moral injury. She also seeks costs.

C. The Centre asserts that her pleas challenging the appointment are irreceivable because she failed to exhaust the internal means of redress. In subsidiary argument it contends that the Director never implemented the competition procedure: he opted right from the start for direct appointment, the "normal way" of filling vacancies of grade P.5 and above. The call for candidates was merely to broaden the choice. The minute of 13 March 2000 explained clearly the criteria followed and gave ample reasons.

The complainant's claim for compensation, for professional and moral injury on the ground that her good name was harmed, is irreceivable because she did not put it forward in her internal complaint. On the merits it submits that what the Tribunal has to determine is whether, in the light of the complainant's allegations and arguments, the measures taken were adequate. It points out that of the incidents she cited in the internal complaint as

examples of harassment, only two could have cast any doubt on her professional competence and those had occurred two years before she filed that complaint. They "do not even begin to prove the existence of a plan to harm her", so the Centre was right to reject her request for an inquiry. It is true that libellous statements cannot be regarded as normal activities of the Staff Union. But, in the interests of freedom of association they are as a rule outside the Administration's jurisdiction, as stated in Judgment 274 (*in re Connolly-Battisti No. 2*) under 22.

D. In her rejoinder the complainant maintains that the decision of 17 April 2000 was "a new one rejecting" her claim for information submitted on 12 April which was amply substantiated, unlike the one of 14 February. So her internal complaint was not out of time.

On the merits she points out that the selection process should have been run by the Selection Committee, not the "panel" chosen by the Director. She asserts that she was the first candidate on the short list, but that because of her union activities, the management would never have allowed her appointment as Chief of the DELTA Programme. In her submission the decision to make a direct appointment "shows substantive, formal and procedural flaws, as well as abuse of authority" and should be set aside because it offends against the principle of equality of opportunity. She was unable to challenge the Director's minute of 13 March 2000 for want of adequate substantiation.

She again observes that until her election to the Chair of the Staff Union Committee, she had always got on with her colleagues and supervisors. She accuses the Centre of prejudging the outcome of the case by stating that the incidents did not even begin to prove the existence of harassment. That could have been shown only by an inquiry. She accuses the management of the Centre of having a hand in the results of the Staff Union Committee elections for the period 1999-2000: it threatened not to renew the appointments of some staff members on precarious contracts if they voted for her.

E. In its surrejoinder the Centre reiterates its objection to the receivability of the complaint insofar as it concerns the impugned appointment, and

accuses the complainant of calling into question some fundamental concepts of administrative law. The burden of proof is on her to show that she was better qualified than the person who was appointed. Her plea of procedural flaws would be receivable only if the procedure had been a competition, which was not the case as is plain from the fact that no Selection Committee was convened.

According to the Centre, the complainant appears to interpret any criticism or disappointments met with in the course of her union or professional activities as vexatious acts. Her last accusation is libellous and quite untrue.

CONSIDERATIONS

1. The complainant joined the staff of the ILO's International Training Centre at Turin in 1975. She is currently Senior Training Officer at grade P.4 in the Distance Education and Learning Technologies Applications (DELTA) Programme.

In August 1998 the Centre advertised the post of Chief of the DELTA Programme. The complainant applied on 22 October. On 16 September 1999 the candidates on the short list, which included the complainant, were interviewed. But she was informed on 28 January 2000 that the post had gone to a colleague who had not applied for it. That appointment was published on 31 January 2000.

2. By a minute of 14 February 2000 the complainant asked the Director of the Centre to give her the reasons for the rejection of her application and "the evaluation criteria and results of the panel's report".

The Director sent her a minute on 13 March explaining the process and criteria that had been applied. In his view "the staff member selected was the best suited to the duties of the post".

Unsatisfied with this reply the complainant sent another request for information on 12 April.

In a minute of 17 April 2000 the Director referred her to his minute of 13 March.

3. The complainant wrote to the Administration several times in June and July 2000 alleging that personal and libellous attacks levelled against her since 1997 by officials at the Centre had caused "serious and repeated injury to her professional and personal reputation". She asked for an inquiry into the psychological harassment she alleged, accused the Centre of inertia and asked it to take disciplinary measures. She said that she was still awaiting a final answer from the Centre to her request for an inquiry. The Chief Personnel Officer rejected her requests in a minute of 14 September 2000.

4. On 12 October 2000 she lodged an internal complaint under Article 12.2 of the Staff Regulations. She challenged the "Director's decision of 17.04.2000 whereby the Centre [had] denied [her] information on the selection criteria and the documents pertaining to the evaluation of the competition tests for the selection for the [Chief] of the DELTA Programme". She also challenged the Chief Personnel Officer's minute of 14 September 2000. Her claims included a request for a "*super-partes* inquiry' to establish that the conduct of the officials [concerned] was unlawful" since, she says, it offended against Article 4.2 of the Staff Regulations; and "disciplinary measures under Chapter XI of the Staff Regulations to be applied in the most appropriate manner and on the basis of justice and equity".

5. By a minute of 8 December 2000, the impugned decision, the Deputy Director of the Centre informed her on the Director's behalf that insofar as her internal complaint was an objection to the "decision" of 17 April 2000, it was irreceivable. As to the decision of 14 September 2000, the "incidents" she cited were spread over three years and so "hardly amounted to an indication of a plan to harm [her]". Only two of them had occurred during the six-month period set by Article 12.2 of the Staff Regulations, and both had been in the context of "normal Union activities" on which "the Administration could not act without interfering".

As a preliminary claim the complainant asks the Tribunal to order disclosure of the selection criteria, the "panel" report and the documents pertaining to the evaluation of the competition tests. Her main claims are to recognition of the unlawfulness of the appointment of 31 January 2000, an

inquiry into the facts of the psychological harassment, compensation for professional and moral injury and costs.

The competition

6. As regards her application for the post of Chief of the DELTA Programme, the complainant takes the view that the Centre acted in breach of Article 1.2 and Annex H of the Staff Regulations, the Selection Committee's rules of procedure, and of the Centre's duty to keep staff informed.

In support of her allegation that her professional and personal reputation were harmed, she submits that the Centre denied her the right to an impartial inquiry into the conduct of the officials concerned. In her submission it was her activities as Chair of the Staff Union Committee that prompted the vexatious treatment of her.

7. The Centre asks the Tribunal to dismiss her challenge to the appointment of the Chief of the DELTA Programme as irreceivable under Article VII, paragraph 1, of the Tribunal's Statute because, it says, the complainant failed to exhaust the available means of redress as concerns her claim to disclosure of documents pertaining to the appointment. Furthermore, in the internal complaint she did not object to the lawfulness of that decision or claim any redress in connection with it. Consequently, her claim to disclosure of documents or additional information shows no cause of action, since it pertains to a decision which she can no longer challenge.

In the Centre's submission, it is absurd to make out, as the complainant does, that the Director's minute of 17 April constituted a new decision rejecting by implication her claim for information. It merely referred her to his previous reply of 13 March 2000. What is more, it made no reference at all to her claim.

Consequently, says the Centre, the six-month time limit established in Article 12.2 for the filing of an internal complaint started to run when the complainant received the decision of 13 March 2000. Since she did not file

until 12 October 2000 the Director was right to dismiss her internal complaint as time-barred.

8. Article VII, paragraph 1, of the Statute of the Tribunal reads:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

Article 12.2 of the Staff Regulations says:

"Any complaint by an official ... shall ... be addressed to the Director ... within six months of the treatment complained of ..."

9. The evidence shows that in her internal complaint about her application for the post of Chief of the DELTA Programme, the decision the complainant impugned was the Director's minute of 17 April 2000.

10. The Tribunal notes that that minute makes no mention of the appointment decision published on 31 January 2000. The decision had indeed been notified to the complainant personally and she did not challenge it expressly. Only before the Tribunal has she asked for it to be quashed. Consequently, her claims concerning the unlawfulness of the decision of 31 January 2000 must be declared irreceivable because she failed to exhaust all internal means of redress.

The present complaint is also irreceivable insofar as it impugns the part of the decision of 8 December 2000 which dismisses the complainant's internal complaint of 12 October 2000 filed against the Director's minute of 17 April 2000.

The Centre was right in its assertion that, according to the case law, the minute of 17 April 2000 could not be regarded as setting off a new time limit for an internal appeal. It merely confirmed the Director's position as set out in his minute of 13 March 2000. It neither altered the previous decision nor provided further justification. It did not relate to different issues from the previous one, nor was it based on new grounds (see Judgment 2011, *in re Dormond Vega and González Vega*).

Since, according to a steady line of precedent, a mere confirmation cannot be regarded as a new decision setting off a new time limit, the decision she could have challenged was the one of 13 March 2000. The date

on which she received it was the starting point of the six-month limit set in Article 12.2 of the Staff Regulations. But she filed her internal complaint only on 12 October 2000, so the Director was right to reject it as time-barred and irreceivable. The claims she made in connection with the internal complaint are also irreceivable as she failed to exhaust the internal means of redress.

The alleged psychological harassment

11. The second part of the complaint concerns the "conduct of certain officials towards [the complainant] which constitutes psychological harassment".

Her main claims are to an inquiry to "establish the unlawfulness" of that conduct, and to compensation for professional and moral injury which she alleges was caused by psychological harassment, humiliation and the "virtual downgrading" she suffered because of her union activities.

In ruling on the second part of the complaint the Tribunal will consider, as the Centre requested, only the allegations made in the internal complaint of 12 October 2000. It will not entertain the others since they have not been addressed in an internal appeal as Article VII, paragraph 1, of the Tribunal's Statute requires.

12. In her internal complaint of 12 October 2000 the complainant alleged unwarranted and intolerable personal attacks against her. She objected that, although they had gone on since 1997, they had not been sanctioned by "any disciplinary measure or formal reprimand by the Centre". Her allegations included the following:

- at a meeting in July 1997 a supervisor said that her opinion was not needed, another member of staff being more competent;
- in September 1997 she was excluded from meetings of the management of the Training Department;
- in February 1998 the new Director of Studies said that she was incapable of managing and planning Research and Training Material Development Section activities;

- in April 2000 the official in charge of a technical programme told the Chief of the DELTA Programme that he could not work with her for "political" reasons;
- in June 2000 the then Chair of the Staff Union Committee said in the course of a meeting that she was difficult to work with;
- in July 2000 a colleague sent a note to all the members of the Staff Union accusing her of "double standards, violence and aggressivity".

13. The Tribunal points out that an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it, and that an accumulation of events over time may be cited to support an allegation of harassment (see for example Judgment 2067, *in re Annabi No. 2*, under 5 and 16).

14. In this case the complainant largely bases her plea of psychological harassment on remarks she attributes to members of staff, on the fact that she was excluded from meetings of the management of the Training Department and on the note of July 2000. But her pleas are bald statements: she offers no evidence that, added together, the separate incidents amount to conduct that betrays malice aforethought.

The evidence shows that the incidents she recounts and which were spread out over time do not, when taken together, reflect such conduct but rather individual positions adopted by a number of officials, including her supervisors.

15. As to the remarks she attributes to the Chair of the Staff Union Committee and the quarrel she says arose between herself and a member of the Staff Union about union matters, the Tribunal endorses the Director's response to her that "the Administration could not act without interfering in union matters".

The second part of the complaint is therefore unfounded.

16. The conclusion is that all her claims must be dismissed as irreceivable or unfounded.

DECISION

For the above reasons,
The complaint is dismissed.

DISSENTING OPINION BY JUDGE RONDÓN DE SANSÓ

1. In this judgment the Tribunal has dismissed the complaint filed by Mrs Adelina Guastavi on 16 February 2001 on the grounds that it was in part irreceivable and in part unfounded.

2. The Tribunal has found irreceivable her challenge to the decision appointing the Chief of the DELTA Programme, on the grounds that she did not exhaust the internal means of redress. It notes that in the internal complaint she neither impugned that decision, notified to her on 28 January 2001 and published on 31 January, nor claimed compensation in connection with it. The Tribunal further notes that there is no mention of that decision in her internal complaint concerning her application for the post and that on this point too the complaint is irreceivable because she failed to exhaust the internal means of redress.

3. I disagree. As I see it, the complainant did ask the Director of the Centre to state why her application had been turned down, and to inform her of the evaluation criteria and the results of the "panel's" report so that she could find out the reasons for the decision. She first sent a minute of 14 February 2000. Then, on 12 April 2000 she repeated her request for information because the Director's minute of 13 March 2000 had not given her an answer. Her second request was rejected by the Director on 17 April 2000. In these circumstances, having failed to obtain the explanation she wanted, the complainant was not in a position to challenge the lawfulness of the appointment published on 31 January 2000, though it was obvious that she disagreed with it.

4. The Tribunal has also declared irreceivable the part of the complaint that challenges the decision of 8 December 2000 rejecting her internal complaint of 12 October 2000 against the decision of 17 April 2000.

It finds that the decision of 17 April did not set off a new time limit for an internal appeal because it was a mere confirmation and so, according to the case law, may not be regarded as a new decision against which an internal appeal may lie. According to the Tribunal, the only such decision is the one of 13 March.

5. Again, I disagree. The minute of 17 April 2000, though it reproduces some elements of the minute of 13 March, is in fact a new decision rejecting the detailed pleadings in the complainant's minute of 12 April 2000, and was not the decision contained in the previous minute.

6. The Tribunal's ruling in Judgment 2011 that mere referral to an earlier decision does not constitute a new one, does not apply in this case because what the minute of 17 April 2000 contains is a new decision, not a confirmation of an earlier one.

7. There are also a number of substantive issues that should have been settled such as whether, once a competition has been opened and candidates have applied, the Administration may switch to selection by direct appointment without giving any explanation to the people involved. In seeking to answer that question the Tribunal would have been bound to discuss what the real reasons were for that change in addressing the substantive pleas: denial of access to information and documents; breach of the Staff Regulations and particularly the rules on filling vacancies; conduct harmful to the complainant's personal and professional reputation; and psychological harassment.

8. In view of the foregoing, I cannot but conclude that in this case the Tribunal should have declared the complaint receivable and entertained the complainant's pleas.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

SEYDOU BA

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

NINETY-SECOND SESSION

In re Kern (No. 11)

Judgment No. 2101

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr Gerbert Christoph August Kern against the European Patent Organisation (EPO) on 27 February 2001 and corrected on 19 March, the EPO's reply of 7 June, the complainant's rejoinder of 10 September, and the Organisation's surrejoinder of 19 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born on 12 October 1933 and holds both Swiss and German nationality. He joined the European Patent Office, the EPO's secretariat, on 27 April 1981 and retired (at grade A4(2)) on 31 October 1998.

Article 12(1) of the Office's Pension Scheme Regulations, which concerns the inward transfer of pension rights, states that:

"An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation not listed in Article I or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension scheme, provided that that scheme allows such transfers to be made.

In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

From 1 April 1971 to 26 April 1981 the complainant was working at the Swiss Federal Institute of Intellectual Property and was paying on a compulsory basis into the Swiss federal pension scheme (the *Eidgenössische Versicherungskasse* (EVK)). Upon taking up employment with the EPO his pension entitlements accrued under that scheme were transferred to the EPO pension scheme – the transfer was completed in early 1983.

For several years prior to 1971 the complainant had been paying compulsory or sometimes voluntary contributions into the German social security pension insurance scheme, administered by the *Bundesversicherungsanstalt für Angestellte** (BfA). It is not in dispute that the complainant's pension rights in the BfA scheme were never transferred to the EVK scheme.

On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office" (hereinafter the Agreement), which came into force on 21 September 1996. Pursuant to that Agreement the complainant applied on 17 September 1996 to have the overall value of his contributions to the BfA scheme transferred into the EPO pension scheme.

By a letter dated 12 December 1997 the BfA confirmed, at the Office's request, that the complainant had paid no contributions between 1 January 1978 and 27 April 1981. The complainant contested the absence of contributions during that period and instituted legal proceedings in the Social Security Tribunal in Munich challenging the BfA's communication of 12 December 1997.

By a letter of 15 May 1998 the Vice-President of Directorate-General 4 (DG4) told the complainant that his request for the transfer could not be granted. He said that years of reckonable service – for the

*Federal Insurance Office for Salaried Employees

period in which an employee belonged to a pension scheme before joining the Office – could be credited under certain conditions. The conditions were defined in Article 12(1) of the Pension Scheme Regulations in conjunction with Implementing Rule 12.1/1 i) a). Pension rights relating to periods of service outside the EPO could be credited only if the aggregate of such rights was taken into account by the pension scheme of the official's last employer before joining the Office. That had not happened in the complainant's case. For the complainant to meet the conditions of the transfer, the EVK would have had to take over his rights accrued under the BfA scheme and then transfer the aggregate amount into the EPO scheme. The Vice-President explained that a direct transfer of rights accrued in the BfA was not possible.

The complainant filed an internal appeal against that decision on 19 May, alleging that it was contrary to the terms of the Agreement. On 8 July 1998 he lodged another appeal in which he challenged several procedural measures taken by the Office in connection with his request for the transfer.

In a report dated 20 November 2000 the Appeals Committee reported on both appeals. It unanimously recommended dismissing them as unfounded. By a letter of 30 November 2000, the impugned decision, the Director of Personnel Development informed the complainant that the President of the Office had rejected the two appeals.

B. The complainant submits that when he applied for the transfer in 1996 he met all the requirements, so the transfer should have been allowed. He contends that the legal basis for the inward transfer is set out in Article 12 and the "Agreement ... on the implementation of Article 12 ..." which came into force on 21 September 1996. He notes that the Organisation does not share his opinion, since it takes the view that the scope of the Agreement is restricted by Rule 12.1/1 of the Implementing Rules that entered into force on 4 June 1981. The complainant interprets that view as a belated "intention" on the part of the Organisation "to restrict the scope of the Agreement". That intention came about only after he had applied for the transfer and can therefore have no retroactive effect on his application. Besides which, the form he filled out to request the

transfer mentioned the Agreement but not the Implementing Rules that the Organisation gives weight to.

Furthermore, he states that the EPO offended against data protection regulations by wrongly using data concerning him obtained from the BfA. It misled the BfA and engaged in "illegal activities" in order to thwart his interests and thus offended against the rules of loyalty and good faith. He assumes that his legal relations with the BfA and his affiliation to the German pension scheme come under German law, and that consequently the German national courts have jurisdiction in the matter; he adds that the law suit he lodged with the Tribunal in Munich is still pending.

The complainant takes issue with the internal appeals proceedings, claiming that the Appeals Committee did not offer impartial justice and there was no satisfactory result. No oral proceedings took place. He learned of the Organisation's arguments for the first time during the appeal process and did not have the opportunity to comment on them before the impugned decision was taken. He interprets the impugned decision as being a "bundle of a large number of decisions" on requests that he put to the Organisation between May 1998 and December 2000 and which have not been duly answered by the EPO - in breach of "the requirements of procedural care".

In addition he finds it unfair that a former colleague at the EPO was allowed the transfer while he was refused it. In his opinion they were in similar situations. He contests the view that only the pension rights accrued in the scheme of the last employer can be transferred. He describes that view as "erroneous" and says it is not evident from the relevant texts.

The complainant wants the impugned decision to be set aside and the requested transfer to take place. In addition he claims damages because of what he qualifies the "useless" and "capricious" internal appeal proceedings and asks for costs for "regular proceedings". In two "conditional" claims, he seeks damages because of "illicit intrusion" into his personal concerns and abuse of personal data and wants his case referred back to the EPO for clarification of various facts and submissions.

C. In its reply the Organisation contends that the complaint is devoid of merit. It emphasises that Article 12(1) combined with Rule 12.1/1 i) a) are the texts that govern the conditions for the transfer of pension rights. From these texts it is clear that the only rights that an official can have transferred are those that accrued in the pension scheme of his last employer before joining the EPO. It takes "last employer" to mean the one a staff member worked for "immediately prior" to joining the EPO. That view is borne out by the Rules and Implementing Instructions governing the pension scheme of the Coordinated Organizations. It produces the text of a footnote to Instruction 12.1/1 of that document (on the inward transfer of previously accrued rights) which corroborates its viewpoint.

It adds that the complainant cannot base his request on the Agreement. The Agreement was concluded to implement Article 12; so it cannot be at variance either with the provisions of that article, or with Rule 12.1/1. Moreover, it is for the Office alone to decide whether according to its own rules the overall transfer value of the contributions made to the BfA can be transferred.

Turning to the accusations made by the complainant against the Office, the EPO rejects them as being devoid of all foundation. The Office has merely applied Article 12 and Rule 12.1/1 in accordance with their wording. By signing the application form for the transfer the complainant gave his agreement to data being exchanged between the EPO and the BfA. There was a clause to that effect on the application form. His objections to the exchange of data are therefore misguided.

So too the Organisation refutes the complainant's objections to the internal appeals proceedings and points out that the complainant himself chose not to attend the Appeals Committee hearing.

D. In his rejoinder the complainant finds it odd that the letter from the Vice-President of DG4 made not the slightest mention of the Agreement even though it purportedly forms the basis of the Organisation's refusal to grant him the transfer. He finds it all the more surprising since the application form for the transfer mentions the Agreement in a prominent place. He points out that the extract from the Rules and Implementing Instructions relating to the Pension Scheme of the

Coordinated Organizations is undated and unverifiable. He names a senior official who would be able to explain the original "intention" of the Agreement as he had headed the EPO delegation involved in negotiating it and wants the Tribunal to hear him as a witness.

The Appeals Committee in his view failed to notice that there was no objective basis for the Organisation's interpretation of the pertinent texts and failed to show independence from instructions of the appointing authority.

The complainant thinks that the EPO has not produced "conclusive and objective evidence" of good legal grounds for the impugned decision. He further develops his claim to damages.

E. In its surrejoinder the Organisation rejects the complainant's various requests for financial compensation. It points out that the Agreement did not form the basis of the Organisation's refusal of his request for a transfer. The purpose of the Agreement is to make it technically possible to apply Article 12(1) and Rule 12.1/1 i) a) and allow the transfer of pension rights, within the limits of the conditions they stipulate. The application form mentions the Agreement because no transfer was technically possible before it was concluded. The official that the complainant wants the Tribunal to hear as a witness, was not involved in negotiating the Agreement.

The EPO confirms that the document that it annexed to its reply, relating to the pension scheme of the Coordinated Organizations, dates from 1992. The footnote itself dates at least from 1979. It points out that the document cited is of relevance because the EPO Pension Scheme Regulations and their implementing rules are based on the provisions in force in the Coordinated Organizations.

It states that the complainant "loses all sense of proportion" in his accusations against the Appeals Committee and qualifies his criticisms as "frivolous".

CONSIDERATIONS

1. The complainant, who has Swiss and German nationality, retired from his employment with the EPO on 31 October 1998. Prior to that, he had made a formal application to have his pension rights that had accrued in the BfA scheme transferred to the Organisation's own pension scheme. Following the refusal of his request, he filed two internal appeals and now seeks the quashing of the final decision rejecting his claims.

2. The Organisation argues that only rights accrued in the pension scheme of the last employer before entry into service of the EPO can be transferred. Immediately before joining the EPO, the complainant was, from 1971 to 1981, in the employ of the Swiss Federal Institute of Intellectual Property and contributed on a compulsory basis to the Swiss federal pension scheme – the EVK – the pension scheme of that employer. Prior to joining the Institute he had for a number of years made both compulsory and voluntary contributions to the BfA scheme. While he continued to make some voluntary contributions to the BfA during his time with the Institute, his contributions to the BfA, both accumulated and ongoing, could not be transferred into the EVK. When he joined the EPO, his rights accumulated with the EVK were transferred into the EPO's pension scheme. His rights in the BfA could only have been credited if they had formerly been transferred into the EVK, which they were not. In fact, up until its amendment in 1995, applicable German legislation prevented the outward transfer of BfA contributions into another pension scheme.

3. Although the complainant makes a large number of allegations about the Organisation's conduct in relation to the manner in which it dealt with his claim to the transfer as well as his internal appeals, it is not necessary for the Tribunal to study them in any detail. The complainant's claim differs in only immaterial respects from the facts and the applicable legal provisions studied by the Tribunal in its recent Judgment 2012 (*in re Goettgens No. 5*) and that case establishes beyond argument that his claim

is unfounded on the merits and that he had and has no right to obtain the requested transfer. That being so, it is of no consequence that he alleges defects and injustices in the internal appeal process; even if everything had been done perfectly, he could still not have succeeded.

4. In Judgment 2012 the Tribunal had to deal with a complainant who, like the present complainant, had made contributions to the BfA and had later been compulsorily affiliated to the pension scheme of the German civil service, and when he joined the EPO existing German legislation prevented him – like the present complainant – from transferring his BfA entitlements directly into the EPO pension scheme. Following the 1995 change in the German legislation, he too sought to transfer his BfA entitlements invoking the terms of Article 1(1) of the Agreement signed between Germany and the EPO in December 1995. The Tribunal held that he could not do so because Article 12 of the EPO Pension Scheme Regulations prohibited such transfer and the Agreement could not have the effect of varying the pension scheme to which it was ancillary.

5. Since that judgment, it is now settled law, first, that the EPO pension scheme allows an employee to make an inward transfer of his contributions from only one previous pension scheme, namely from the scheme of his immediately preceding employer, and, second, that the Agreement between Germany and the EPO concluded as a result of the 1995 change to German national legislation does not have the effect of changing the applicable rules of the EPO pension scheme. Since the complainant's rights in the EVK, which did not include his accumulated rights in the BfA, were transferred into the EPO pension scheme shortly after he joined the Organisation, it follows that he cannot now obtain the transfer of the rights accrued under the BfA and his complaint must be dismissed.

6. Two final matters call for brief comment. In the first place, it is in vain that the complainant seeks to introduce evidence and even to call witnesses, to explain the meaning of the Agreement entered into between

Germany and the EPO or to show that the meaning and scope given to that agreement by the Tribunal in Judgment 2012 was mistaken. The interpretation of contracts is not normally a matter of evidence but a question of law, which is fully within the Tribunal's competence. There is nothing in the circumstances of the present case which would justify the Tribunal in making an exception to that general rule and obtaining such evidence.

7. Secondly, the Tribunal does not comment on the complainant's assertion that the German national courts have jurisdiction in this matter. It limits itself to stating that it does not pretend to have any competence to apply German domestic law. The present decision is based on the Tribunal's construction of the applicable pension scheme rules and the Agreement between Germany and the EPO.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Jazayeri

Judgment No. 2102

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Ahmad Jazayeri against the International Fund for Agricultural Development (IFAD) on 8 December 2000 and corrected on 20 December 2000, IFAD's reply of 17 April 2001, the complainant's rejoinder of 30 July, the Fund's surrejoinder of 19 October, the complainant's further brief of 25 October and IFAD's observations thereon of 1 November 2001;

Considering Articles II, paragraphs 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Iranian national born in 1957, joined IFAD at its headquarters in Rome on 8 December 1986 as an assistant project controller at grade P.3 in the Africa Division, on a fixed-term appointment for two years. In 1988 his appointment was extended for five more years and in 1993 he was given an indefinite appointment. At the material time he was a project controller at grade P.5.

In June 1997 he asked for special leave without pay, but IFAD refused in a memorandum of 30 October 1997. By a memorandum of

6 November the complainant submitted his resignation, which IFAD accepted on the same day. Although his resignation was due to take effect on 5 February 1998, he actually left IFAD on 31 December 1997 in order to use up accrued leave. On 17 June 1998 the President informed IFAD member States that the complainant left the Fund on 1 January 1998. Before leaving he had started up a company under the name "Financial Services Associates (FSA) International Limited", which was registered in London.

In the course of 1997 an external audit of IFAD, carried out by a firm of auditors, brought to light some irregularities in procurement procedures. A number of projects in the complainant's charge were involved. IFAD held an internal investigation which, it says, revealed that three external consultants hired by the complainant made over to him sums of money which were then transferred to personal bank accounts under his and his wife's names in Jersey and Guernsey (United Kingdom).

Having learned that the Fund had suspended settlement of his terminal entitlements, the complainant sought an explanation by a letter of 3 August 1998. The Director of the Personnel Division replied in a letter of 12 August that IFAD was looking into some "potential irregularities" within his former areas of responsibility and "possible monies owing". It was therefore reconsidering the grounds for his separation and was as yet unable to proceed with any separation settlements.

On 14 September the Fund brought criminal proceedings against him in the Italian courts and on 19 November 1998 a warrant was issued for his arrest on charges of extortion by a public official. The complainant having left the country, the Public Prosecutor issued extradition warrants, first to the United Kingdom then to the Netherlands. On 15 March 1999 he was arrested in the Netherlands and remained in custody until 10 March 2000, when he was extradited to Italy and again placed in custody until 27 April 2000.

On 10 October 1998 the complainant had written to the President of IFAD requesting a review of the decision of 12 August. He claimed payment of his termination entitlements, and damages. In his reply of 19 October the President said that he should contact IFAD's legal counsel.

Inferring an implied rejection of his claims, the complainant went to the Joint Appeals Board on 24 November 1998.

On 12 May 1999 the complainant wrote to the President requesting a review of the decision to bring criminal proceedings against him. He asked IFAD to withdraw that complaint and grant him assistance in recovering his freedom and obtaining annulment of the criminal charges. The President replied in a letter of 4 June that the matter was now in the hands of the Italian authorities and they would decide on the future course of the proceedings. Moreover, the case was a criminal one and as such not subject to administrative appeal. On 14 July 1999 the complainant lodged an appeal with the Joint Appeals Board.

By letters of 1 September 2000 the presiding officer of the Board sought information from the parties about the criminal proceedings.

On 29 September 2000 the Fund went to the High Court of Justice in England claiming restitution of monies which it said the complainant had received unlawfully while he was working for the Fund, or else damages.

On 8 December 2000 the complainant lodged two complaints with the Tribunal. This one is "against the decision of the President [of IFAD] to do everything within his authority and influence to have the complainant imprisoned".

B. On receivability the complainant observes that, according to the case law, the rule that internal remedies must be exhausted pursuant to Article VII, paragraph 1, of the Tribunal's Statute may be waived in some instances. In his submission, the facts show clearly that the appeal procedure was unlikely to end within a reasonable time and that IFAD failed to discharge promptly its obligations under that procedure, in breach of the case law. Consequently, there are no real grounds for objecting to the receivability of his complaint, which is fully in keeping with the requirements set in the Tribunal's Statute as interpreted in the case law.

The complainant has several pleas on the merits. The first is breach of due process: the impugned decision is unlawful because he was denied his right to a hearing. The President "secretly" brought criminal proceedings against him for offences he allegedly committed in, or at any rate in connection with, the performance of his duties at IFAD, without

first informing him of the charges against him and giving him an opportunity to answer them, as it is bound to do in any disciplinary procedure. As a result, he was imprisoned. As well as affecting his status, the impugned decision has caused him injury and, what is worse, impaired his freedom, which is his most prized possession.

Secondly, the impugned decision is also flawed by abuse of authority. In his view, the President of IFAD clearly used his prerogatives to attain some purpose other than those which the authority is supposed to serve or, to put it more broadly, one that is irrelevant to the organisation's interests at large. The President was, and still is, bent on his "undoing".

Thirdly, he accuses IFAD of failing in its duty to respect the dignity and good name of its employees and former employees, and of causing him undue and unnecessary injury. It spread rumours about the complainant – not just within the Fund but also outside, including among the member States – these were particularly devastating because at the Fund's insistence, the United Nations Food and Agriculture Organization (FAO) refused to honour a long-standing professional commitment it had made to the complainant.

Lastly, he pleads serious financial and moral injury: he was deprived of all sources of income during his fourteen months in prison, and the Fund has had no compunction about sullyng his name.

He asks the Tribunal:

"to order the quashing of the impugned decision and award [him] all consequent redress, namely:

- (a) to find and declare unlawful all IFAD's acts which were a cause or consequence of the decision;
- (b) to order IFAD to pay [him] an amount ... in compensation for the income he was unable to receive while in prison, and the serious moral injury caused by his imprisonment and the resulting affront to his dignity and good name; [and]

to award [him] ... costs ..."

C. IFAD replies that what the complainant is really objecting to is the fact that the President brought criminal proceedings against him. He makes out, wrongly, that the case is a straightforward administrative and disciplinary one. In IFAD's submission the Tribunal is not competent to hear the case. Its competence, like that of all international administrative

tribunals, is conferred and strictly defined by its Statute and is limited to administrative decisions taken by organisations which have recognised its jurisdiction. The Fund's decision is obviously outside the scope of the Tribunal's Statute, and the complainant's offences are criminal and so fall within the jurisdiction of the national courts.

In subsidiary pleas IFAD submits that the complaint is irreceivable because the complainant failed to exhaust his internal remedies, having "abandoned" his administrative appeal, which is still before the Joint Appeals Board. The Fund is not to blame for the delay in the internal procedure: it was due solely to the fact that there were criminal proceedings under way and, above all, that the complainant repeatedly lodged appeals in Italy, as he had in the Netherlands, when attempting to avoid extradition. The complainant's plea that the Tribunal sometimes waives the requirement for exhaustion of internal remedies is unsound because the arguments he adduces in support are immaterial. In this case the reasons for the delay were quite exceptional, and besides, the issue before the Tribunal is not a disciplinary one.

In further subsidiary pleas, on the merits, the Fund refutes each of the complainant's arguments.

First, it observes that the safeguards afforded by due process are more limited in criminal proceedings than in administrative and disciplinary cases. In penal proceedings higher dictates may warrant confidentiality: preservation of evidence, the safety of witnesses and the cessation of disturbances. In the interests of such confidentiality, an international organisation may, indeed must, refrain from disclosing to the staff member the existence or status of an investigation about him. This is a principle that the Tribunal expressly recognised in Judgment 1756 (*in re Awoyemi*). Besides, international civil service law lays no obligation on an administration to inform its staff of the opening of criminal proceedings. And given the exceptional circumstances of the case, IFAD had good reason – even a duty – not to invite the complainant to account for himself in connection with the criminal investigation. In any event, he was given the opportunity to be heard by the judge at the preliminary investigation stage.

Equally unfounded is his allegation that the Fund's decision to bring criminal charges showed abuse of authority. The mere fact that the complainant "expressly agreed" to be sentenced devoids the plea of all substance and confirms that there was nothing arbitrary about IFAD's criminal complaint.

Lastly, the defendant denies harming the complainant's dignity and spreading groundless rumours. It merely informed the FAO that he was under investigation and notified his departure from the Fund to member States. The facts show that, on the contrary, it was IFAD's interests that were harmed by the complainant's conduct.

It asks the Tribunal to defer ruling until the matter of the complainant's liability has been settled once and for all by the High Court of Justice in England, and to award costs against the complainant in an amount of 50,000 Swiss francs.

D. The complainant rejoins that the Tribunal alone is competent to rule on the case, and that it cannot be seriously argued that the impugned decision is not an administrative one. In his submission IFAD has opted to initiate various types of proceedings in which it stands to lose nothing, rather than to account for itself before the Tribunal, which has the competence to find against it. As to the Fund's request for a deferral, the Tribunal is competent to deal with all aspects of the case and he sees no basis in any rules or general principle of law on which it should be required to await a decision from the civil courts. He points out that his claim is to the quashing of the President's administrative decision not to give him a fair hearing before bringing criminal proceedings - a decision which has had disastrous consequences for him and his family.

As for the delay in the internal appeal procedure, the complainant submits that one cannot, in good faith, blame him for making use of available legal channels to secure prompt release from prison. By asking him for information to which only the Italian police and legal authorities normally have access, the Joint Appeals Board acted *ultra vires*.

He denies that his resignation was in any way related to the 1997 external audit: he resigned because IFAD refused his request for special leave without pay. Nor was his acceptance of the court sentence in Italy an

admission of guilt. He agreed to it so he could "be released immediately rather than languishing for months or even years in prison". He did receive money from consultants but it was mere repayment of a loan in one case and in the others, it was to "get jobs done that the [consultants] could not do" and to help them out by doing some of their purchasing for them.

He presses his pleas and puts forward arguments to show that the defendant's case is groundless. Amongst other things, IFAD has misconstrued Judgment 1756.

E. In its surrejoinder the Fund points out the complainant admits that some of the fees due to consultants were credited to his personal bank accounts unbeknown to his supervisors. He is therefore guilty of fraudulent handling of IFAD funds. Furthermore, since he was unable to account for the money, the only plausible explanation is that he used it for his own purposes.

The complainant tried to hide the fact that he agreed to be sentenced for extortion in exchange for a reduced term in prison. So one can legitimately surmise, says IFAD, that he would not have agreed to it had he been innocent. The reason why IFAD filed a civil suit in England to obtain restitution of monies was that civil action was precluded in Italy by the complainant's acceptance of the reduced sentence which put an end to the proceedings there. IFAD does not have immunity from the execution of judgments in England, so there is no substance to the complainant's argument that he fell foul of an international organisation, which is "untouchable". IFAD adds that, in a witness statement filed in the course of the High Court proceedings in England, the complainant's counsel was extremely optimistic about his client's chance of success before the Tribunal since, according to the Fund, he said an award by the latter "is bound" to be higher than an award to IFAD by the English courts. The Fund points out that the High Court handed down a judgment on 11 October 2001 rejecting its application for a summary judgment.

Lastly, IFAD notes that the Tribunal is being asked to rule on a question of principle which it has never had to address before: to establish an obligation to give *prior* notice of a criminal complaint would,

in practice, put a stop to any effective legal action by international organisations in the future. Such a decision would be the more unacceptable as it would accord *de facto* impunity to dishonest international civil servants or former international civil servants who commit criminal offences. What is more it would put international organisations in a position where they would be in breach of the headquarters agreements signed with their host countries.

F. In a further brief the complainant explains that by dismissing the Fund's application for summary judgment, the High Court of Justice has disproved the allegation that he had no plausible arguments. He submits that IFAD has distorted his counsel's statement: the latter merely pointed out that the Tribunal had, on several occasions, awarded large sums of money to complainants where decisions taken in breach of their most fundamental rights had caused them serious injury.

G. In its observations the Fund contends that the complainant has misunderstood the High Court's judgment: all the latter did was to dismiss IFAD's application to have the case dealt with by a process which would be more expeditious and less costly for both parties.

CONSIDERATIONS

1. On 18 June 1997 the complainant, who at the time served the Fund as project controller for Central and West Africa, applied for special leave without pay. IFAD having refused it on 30 October 1997 he submitted his resignation on 6 November 1997. IFAD accepted it on the same day and the complainant left the Fund on 31 December 1997.

2. On 30 May 1997 he had set up, in association with his wife, a company which was registered in London under the name "Financial Services Associates (FSA) International Limited", and whose main purpose was to provide assistance to African countries. The complainant has admitted in the course of these proceedings that "he should have waited until he left the Fund before registering [his] company". He points out, however, that it was after he set up the company that he applied

for special leave, and that he never used his job at IFAD or any of the latter's funds to further the company's interests. He says that he began consultancy work in the company in the first quarter of 1998.

3. In 1997 a firm of auditors brought in by IFAD found irregularities in procurement procedures, some of which were found in projects in the complainant's charge. The Fund accordingly opened an internal inquiry, which, it says, revealed that three external consultants recruited by the complainant had credited large sums of money to accounts belonging to the complainant and his wife in Jersey and Guernsey.

4. On 3 August 1998 the complainant asked the Director of the Personnel Division to explain why the settlement of his repatriation allowance and pension entitlements had been suspended. He was told on 12 August that the Fund was investigating whether he was in any way responsible for the irregularities in his former area of work and whether he owed the Fund any money. On 31 August he asked IFAD to disclose all the charges and documentary evidence it had used or was using in its investigation, so that he might properly defend himself.

5. In September 1998 IFAD decided to file a criminal complaint with the Italian courts accusing the complainant of abuse of office and, in particular, of having threatened to put an end to the contracts that some external consultants had with IFAD unless they paid him, with the result that they credited large sums of money to bank accounts in his name in "tax havens". The Italian investigating judge found that there were serious facts and enough corroborative evidence to charge him with extortion, and issued a warrant for his arrest. The complainant having left Italy, the Public Prosecutor sent warrants for his extradition first to the British then to the Dutch authorities. Having been arrested and jailed in the Netherlands in March 1999, the complainant filed an appeal against extradition which the Netherlands Supreme Court dismissed on 4 January 2000. He was extradited to Italy on 10 March 2000. On 27 April 2000 he was released under a procedure known in Italy as "*patteggiamento*": he agreed to a suspended prison sentence on the charges brought in exchange for closure of the case with no criminal record. He says that he "accepted

the procedure because it meant that he could be released immediately rather than languishing for months or even years in prison until the whole ridiculous affair was cleared up".

6. In a letter of 12 May 1999 the complainant requested a review of the President's decision to do everything "within [his] authority and influence to have [the complainant] imprisoned". He asked the President to withdraw the criminal complaint, give him all the assistance he needed to recover his liberty and to grant him compensation for all the injury he suffered. In support he argued that the decision to take him to criminal court was in breach of due process and the principle that an international organisation must avoid causing any unnecessary or undue injury to its staff, and had impaired his dignity and good name.

7. On 4 June 1999 the President rejected his request on the grounds that it did not concern the terms and conditions of his employment and was unfounded besides. The complainant therefore appealed to the Joint Appeals Board on 14 July 1999 reiterating his arguments and claiming payment of the costs he had incurred in obtaining legal assistance. After a number of procedural incidents concerning his legal representation, which have no bearing on this dispute, the complainant concluded that the Joint Appeals Board was unlikely to take a decision within a reasonable period of time, particularly as civil proceedings to recover amounts due were pending against him in the High Court of Justice in England. He therefore decided to come straight to the Tribunal and filed his complaint on 8 December 2000.

8. The complainant wants the Tribunal to set aside the President's implied rejection of his request for review of 12 May 1999, "to find and declare unlawful all IFAD's acts which were a cause or consequence" of the decision and to order IFAD to pay various sums in compensation for his loss of earnings and the moral injury caused by his imprisonment. He also claims costs.

9. In rebuttal IFAD argues that the Tribunal is not competent to hear the complaint, and his claims are irreceivable.

10. In support of the first argument, it submits that the dispute is not about the terms and conditions of the complainant's appointment or IFAD's rules and regulations, and that the charges against its former employee were a matter for the national courts alone. The argument is not without weight, particularly as the complainant ceased being a member of the Fund's staff as from the date on which his resignation took effect, which was prior to the proceedings in the Italian courts. The Tribunal observes, however, that the duty laid on international organisations to treat their staff with due consideration and not to impair their dignity may extend beyond the term of their appointment. In charging a staff member with misconduct in the performance of duty an organisation must observe due process, otherwise it may be held liable even after its contractual or statutory ties with the official have ceased, and the Tribunal will entertain such matters.

11. As to receivability, the evidence shows that the Joint Appeals Board had postponed hearing the complainant's case on the grounds that it needed further information which the parties had apparently not submitted. In the particular circumstances of this case the complainant had good grounds for believing that there would be no decision within a reasonable time. There was therefore nothing unlawful about his coming to the Tribunal without waiting for the Joint Appeals Board to rule.

12. On the merits, the complainant's claims are bound to fail. Citing the case law, he points out that in the event of disciplinary procedure or dismissal international civil servants enjoy certain safeguards. However, subject to what is said in 10 above, those safeguards do not apply where criminal charges are brought against a former official for acts committed prior to the termination of his service. In this case the material rules are those of the applicable code of penal procedure and not the rules on disciplinary proceedings. The Fund did not initiate such proceedings and can no longer do so because the complainant has resigned. There is nothing in the evidence to support the complainant's assertion that the President used his prerogatives for purposes other than the general interest, and that he was guilty of abuse of authority because "the Italian legal authorities [were] particularly considerate towards him". The

complainant's dignity and good name were undoubtedly affected by the criminal complaint against him and the judicial proceedings that ensued. But once the nature of the offences came to light, the Fund was bound to hand the matter over to the appropriate authorities and so may not be taken to task for causing its former employee undue and unnecessary injury. Furthermore, his objection that he is "no longer able to do as he wishes with his assets" because IFAD has sued him in the English civil courts affords no grounds for holding the Fund liable.

Consequently, the complaint must be dismissed.

13. In the circumstances of the case, the Tribunal sees no reason to allow the Fund's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

The complaint and IFAD's counterclaims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JEAN-FRANÇOIS EGLI

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Jazayeri (No. 2)

Judgment No. 2103

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Ahmad Jazayeri against the International Fund for Agricultural Development (IFAD) on 8 December 2000 and corrected on 20 December 2000, IFAD's reply of 17 April 2001, the complainant's rejoinder of 30 July, the Fund's surrejoinder of 19 October, the complainant's further brief of 25 October and the Fund's observations thereon of 1 November 2001;

Considering Articles II, paragraphs 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts that prompted this dispute are identical to those recounted under A in Judgment 2102 delivered this day in which the Tribunal ruled on Mr Jazayeri's first complaint.

This complaint is "against the decision by the President of IFAD to reconsider the legal basis of the complainant's separation from service and to 'suspend' formalities for the payment of his entitlements (including his pension entitlements)".

B. On receivability, the complainant refers to the arguments he developed in his first complaint. He also adduces the same pleas on the merits: breach of due process, abuse of authority, failure to respect his dignity and good name and serious financial and moral injury.

The complainant says that he is now not sure that it was ever the Fund's intention to pay him, or to allow the United Nations Joint Staff Pension Fund (UNJSPF) to pay him, anything at all. According to the evidence in his possession, the UNJSPF has "never received any documents from IFAD about his separation from service, which justifies serious doubts as to the Fund's intention to pay his entitlements".

He pleads injury on two counts. The Fund undoubtedly caused him financial injury by not paying him his entitlements (particularly his pension entitlements and his repatriation grant amounting to some 120,000 and 20,000 United States dollars respectively). To that must be added the loss of earnings he has sustained because the United Nations Food and Agriculture Organization (FAO) decided not to honour a long-standing professional commitment it had with him. He alleges that the Fund caused him serious moral injury by treating him in a manner which offended against the most elementary rules of justice and equity.

He asks the Tribunal:

"to order the quashing of the impugned decision and award [him] all consequent redress, namely:

- (a) to order IFAD to pay [him] an amount corresponding to all allowances and the pensioner's entitlements due to him upon separation from service, plus interest on arrears at the rate of 10 per cent a year as from the date of his separation;
- (b) to order IFAD to pay [him] compensation ... for moral injury; [and] to award [him] ... costs ..."

C. In its reply IFAD's main plea is that this Tribunal is not competent to hear the case. Insofar as the complainant is claiming his pension entitlements, which may be granted only by the UNJSPF itself, the competent body is clearly the United Nations Administrative Tribunal. The

Fund points out that Article 48* of the Regulations of the UNJSPF seems to require that an appeal can lie only against a decision by the UNJSPF itself. This Tribunal has nonetheless held that a decision by the administration may be reviewed by the United Nations Administrative Tribunal if it concerns some issue affecting the staff member's pension entitlements.

Secondly, IFAD contends that the complaint is irreceivable for failure to exhaust the internal remedies.

In subsidiary arguments, on the merits, it submits that it had every right to delay issuing the form allowing payment of the complainant's pension entitlements. It cites an Administrative instruction issued by the United Nations on 31 August 1990 under which, before issuing documents pertaining to separation from service, the administration has to ascertain that the staff member has discharged all his or her obligations, debts and responsibilities towards the organisation. IFAD's "suspension" of the formalities for payment of his entitlements was fully in line with that instruction since the complainant had not discharged all his debts.

As it did in its reply to the complainant's first complaint, IFAD asks the Tribunal to postpone ruling until the High Court of Justice in England has taken a final decision about the complainant's liability, and to award costs against the complainant in an amount of 50,000 Swiss francs.

D. In his rejoinder the complainant points out that the non-payment of the repatriation allowance is undeniably a matter for the Tribunal. He observes that in this complaint he makes no mention whatsoever of "non-observance of [the] Regulations [of the UNJSPF] arising out of [a] decision of the Board". The impugned decision was taken not by the Board but by IFAD: the dispute is not about payment of his pension entitlements by the UNJSPF but about IFAD's decision not to forward the requisite forms to the former, which was consequently unable to proceed with the settlement.

*Paragraph (a) of Article 48 provides in particular that:

"Applications alleging non-observance of these Regulations arising out of the decision of the Board may be submitted directly to the United Nations Administrative Tribunal."

On the merits he observes that IFAD wrote him no letters either to say that he owed it money or to specify the exact amount of the debt and ask him to repay it. In his view the Fund may not seek reimbursement of monies for which the consultants provided the prescribed service. Nor may it claim repayment of monies it knows were used in its own interests or those of the consultants.

E. In its surrejoinder IFAD reiterates its objections to the competence of the Tribunal and to the receivability of the complaint.

It presses its pleas on the merits. Citing the letter it addressed to him on 12 August 1998 it asserts that it did inform the complainant of his debt. To provide him with further information in order to "specify the exact amount of the debt and ask him to repay it" was out of the question: he must have known that he would one day have to repay to IFAD the funds he had misappropriated. IFAD could not warn him in advance that his conduct amounted to a criminal offence for which it would take him to court, without running the risk of evidence being destroyed and preventing justice from being done in the Italian courts.

Reiterating the arguments it adduced in its reply to the complainant's first complaint, the Fund submits that a decision by the Tribunal ordering it to give prior notice of the filing of a criminal complaint would be unacceptable.

F. In a further brief the complainant explains that in a judgment of 20 October 2001 the High Court of Justice in England rejected IFAD's application for summary judgment, thus disproving the allegation that he had no sound arguments.

G. In its observations the Fund contends that the complainant has misread the judgment of the High Court: the latter merely rejected IFAD's application to have the case dealt with by a process which would be more expeditious and less costly for both parties.

CONSIDERATIONS

1. The facts that prompted this complaint are set out in Judgment 2102 delivered this day. As recounted in that judgment, having left IFAD on 31 December 1997 after resigning, the complainant inquired on 3 August 1998 why IFAD had suspended the formalities for payment of his repatriation grant and pension entitlements. IFAD replied on 12 August 1998 that it was reconsidering the reasons for his separation from service and was not in a position to proceed with the corresponding entitlements. On 10 October 1998 the complainant wrote to the President of IFAD requesting a review of that decision, to pay him what he was owed in separation entitlements, and compensation. The complainant went to the Joint Appeals Board on 24 November 1998 appealing against the President's reply of 19 October and reiterating his claims. In response to a request of 21 February 2000 from the Fund to postpone its ruling, the Board gave the parties a time limit to submit documents pertaining to "the plea bargain sentence" in the criminal case discussed in Judgment 2102. In the absence of any ruling from the Board, the complainant has come to the Tribunal seeking the quashing of the implied rejection of his request for review dated 10 October 1998, payment by IFAD of "an amount corresponding to all allowances and the pension entitlements due to him upon separation from service, plus interest on arrears at the rate of 10 per cent a year as from the date of his separation", and compensation for moral injury. He also claims costs.

2. IFAD rebuts the complainant's claim to pension entitlements on the ground that the Tribunal is not competent to hear the complaint. It points out that the staff of IFAD are affiliated to the UNJSPF and that Article 48 of the latter's Regulations confers on the United Nations Administrative Tribunal competence for complaints concerning pension entitlements. That is borne out by Article 28 of the Rules of Procedure and Guidelines of the Joint Appeals Board.

3. The Tribunal observes that the dispute is not about the scope of his pension entitlements but, as the complainant himself points out, about IFAD's decision not to send to the UNJSPF documents enabling it to

consider and, if appropriate, settle the claim. The Tribunal is of course not competent to rule on the complainant's pension entitlements, but the only current issue is whether the Fund discharged its obligations to its former employee. The fact that the UNJSPF was not given the requisite documents is immaterial to this case, so the Tribunal is competent to hear it.

4. IFAD contends that the complaint as a whole is in any event irreceivable because the complainant failed to exhaust all the available internal means of redress. Its explanation of the delay in the internal procedure is that the case was an exceptional one: IFAD was unable to defend itself openly because Italian criminal law bound it to secrecy. Moreover, the complainant contributed to the delay by repeatedly filing appeals in Italy and the Netherlands in order to avoid imprisonment and extradition. He also failed to provide the Board with the information it requested. In any event, says IFAD, "there is no doubt that the [Board] would come to a final decision".

5. On receivability, the Tribunal sees no evidence that a prompt response could be expected from the Board to an appeal which had been before it since 24 November 1998. The dispute was not so exceptional as to preclude consideration within a reasonable period. IFAD's failure to hear the internal appeal can be justified neither by the secrecy required during the investigation nor by the court proceedings, past or present. The conclusion is that the complainant acted lawfully in coming to the Tribunal without awaiting the outcome of an internal procedure that had become bogged down.

6. On the merits, in rebuttal of the plea that it failed to provide the forms needed for consideration of his pension entitlements and payment of his repatriation grant, the Fund submits that it was right to suspend settlement of his various terminal entitlements because the complainant had not "discharged all his debts to IFAD". It cites a "general rule of international civil service law" set forth in a United Nations Administrative instruction of 31 August 1990: on leaving service a staff member must settle all his debts towards the organisation and the administration may refuse to

issue the form for the UNJSPF or delay issuing it until the requirement has been met.

7. The Tribunal does not share IFAD's view. It is true that an organisation may try by all legal means to recover any money a staff member may owe it when he or she leaves service. But that does not entitle it to suspend or block consideration of the staff member's pension entitlements.

8. If the Tribunal were to allow the complainant's claims, IFAD asks it to postpone ruling until the English courts have judged the civil suit against its former employee. But the dossier shows that the case will not be heard until the summer of 2002, and there is nothing to prevent the Tribunal from ruling on the complainant's claims forthwith.

9. The conclusion is that the complainant may lawfully seek the quashing of the decision refusing to send the UNJSPF the forms it needed in order to consider the complainant's pension entitlements. But it is not for the Tribunal to order IFAD to pay the complainant the arrears of pension due to him. The settlement of his pension rights is a matter for the UNJSPF alone, and may be challenged before the United Nations Administrative Tribunal if need be.

10. However, as for his claim to payment of the repatriation allowance the Tribunal is of the view that since the Italian criminal court allowed IFAD's complaint, that a large amount of money was involved and that IFAD had to go to the High Court to seek repayment of the funds misappropriated by the complainant or, failing that, damages, IFAD was right to defer consideration of the complainant's entitlement to a repatriation allowance.

11. The complainant's other pleas – breach of due process, abuse of authority and failure to respect his dignity and good name – are the same as those examined in Judgment 2102 delivered this day and the Tribunal's ruling on them will also be the same. In view of the circumstances of the case, the Tribunal cannot allow his claim to moral damages.

12. Having succeeded in part, the complainant is entitled to costs, which are set at 2,000 euros.

13. In view of the circumstances of the case, the Tribunal sees no reason to allow IFAD's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

1. IFAD's implied decision to reject the complainant's request for review dated 10 October 1998 is set aside insofar as it upholds the suspension of the formalities for the consideration of the complainant's pension entitlements.
2. IFAD shall send to the UNJSPF the form certifying the complainant's separation from service.
3. IFAD shall pay the complainant 2,000 euros in costs.
4. The complainant's other claims are dismissed.
5. IFAD's counterclaims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JEAN-FRANÇOIS EGLI

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* Tebourbi**

Judgment No. 2104

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Habib Tebourbi against the International Telecommunication Union (ITU) on 23 January 2001 and corrected on 6 February, the ITU's reply of 11 May, the complainant's rejoinder of 6 June and the Union's letter of 13 July 2001 to the Registrar stating that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Tunisian who was born in 1941, joined the staff of the Union on 16 October 1995 having been seconded by the government of his country at the request of the ITU's former Secretary-General. He was recruited as an adviser on a short-term appointment at grade P.5 which was renewed several times. One of his duties was to assist the Telecommunication Development Bureau (BDT) in implementing

resolutions and decisions which the ITU's governing bodies adopted in 1994 to promote the use of telecommunications and information and space technologies in protecting the environment.

By a memorandum of 18 February 1999 the new Director of the BDT asked the acting Chief of the Personnel and Social Protection Department to extend the complainant's appointment until 31 July 1999, and informed him that he had warned the complainant that implementation of the "Telecommunications-Environment" project would not continue in the same form beyond that date. The complainant nonetheless got a new appointment for the period from 30 August 1999 to 3 March 2000. But by a memorandum of 29 February 2000 his first-level supervisor told him that although he had set formalities in motion on 31 January to renew it, the renewal would finally not go ahead.

The complainant protested to the Secretary-General in a memorandum of 6 March. He pointed out that he had been assured that he would keep his post for at least five years; that he needed only one more year to complete the five years of contributions to the United Nations Joint Staff Pension Fund which would entitle him to a pension; and that he was only eighteen months away from retirement. He sought a "fair settlement of [the] issue". Having got no reply, in a letter of 12 April he again asked the Secretary-General to reconsider his decision. Citing financial constraints the Secretary-General replied on 22 May that he upheld the decisions notified to the complainant orally several times by the Director of the BDT and in writing on 29 February. The complainant appealed to the Appeal Board on 12 July 2000. Having heard no more, he has filed this complaint challenging the implied rejection of his appeal.

B. Citing the case law the complainant submits that his case is receivable. The ITU disregarded the time limits applying to internal appeals: although he sent in his request three times there was no response.

No reasons for the non-renewal were given in the decision of 29 February 2000 notifying it to him nor in the Secretary General's reply of 22 May. His appointment was due to end on 3 March, and in the circumstances four days cannot be regarded as sufficient notice. Not until

the day on which his contract expired did he get the memorandum of 29 February 2000. He alleges that the Director of the BDT never informed him orally of the imminent non-renewal, and that the memorandum of 18 February 1999 cannot be treated as notice. What is more, the Director of the BDT and his first-level supervisor (who was best placed to judge whether or not his services should be extended) gave him oral assurances that his post would be maintained.

In his submission the ITU's financial arguments cannot stand as there were funds available for the renewal of his appointment. Furthermore, the impugned decision is contrary to the Union's interests: his supervisor's endeavours to keep him on the staff are evidence that his services were "badly needed" in the BDT until the end of 2000. The Union has transferred most of his duties to a colleague, who, in his view, did not possess the right skills; and in so doing it broke the rules since the official in question was to have retired at the end of February 2000. He alleges that he has fallen victim to a "witch hunt": the present Director of the BDT discriminated against him because he has the same nationality as the latter's predecessor, with whom he worked closely.

On the issue of his pension entitlements, he cites Judgment 245 (*in re Meyer*) submitting that it ought to be the basis for the Tribunal's ruling. In that dispute the organisation refused to extend the complainant's appointment by thirteen days so that he could complete the five years of contributions he needed to entitle him to a pension. The Tribunal found that obviously wrong conclusions had been drawn from the evidence and ruled that the organisation should "extend the complainant's final appointment so as to bring his total period of service to five years".

The complainant asks the Tribunal to quash the decisions of 29 February and 22 May 2000 and to order his reinstatement as from 4 March 2000 so that he is assured of completing the five years of contributions entitling him to benefit from the Pension Fund. Should the Tribunal order reinstatement after that date, he seeks compensation for material injury, namely the emoluments and allowances he would have received had his appointment been duly renewed. He also claims moral damages and costs.

C. In its reply the Union first explains the circumstances in which the complainant's appointment came to an end. In February 1999 the new Director of the BDT told him that for financial reasons the BDT was to be restructured so his contract would not be renewed beyond 31 July 1999. The Union was able to renew it for six months by means of a temporary financial arrangement, but it gave him no assurance that he could subsequently expect a further renewal, particularly not for a period long enough to enable him to complete five years of contributions to the Pension Fund. At the beginning of 2000 the Director of the BDT decided to proceed with the restructuring. It was for that reason that his contract was not renewed, and not because the Director wanted to "get rid" of officials who had worked closely with his predecessor.

The ITU enlarges on its reasons, referring to a memorandum of 18 October 2000 from the Director of the BDT to the Secretary-General which is attached to its reply. According to the memorandum, the Director did consider the requests put to him by the complainant's supervisor, but as manager of the BDT's resources he was unable to agree to them. Based on financial considerations, the decision not to renew his appointment was taken in the Union's interests. His supervisor's representations did not amount to a promise or guarantee of renewal, since the authority for such decisions is not his. It was for the Director of the BDT to judge whether the complainant should be kept on, and in the event renewal was found not to be necessary: the work he had been doing could still be continued.

D. In his rejoinder the complainant observes that the ITU has provided no evidence of the financial difficulties it alleges. In his submission the Union's pleas concerning the period from February to July 1999 should be disregarded since that period is immaterial to the present dispute, his contract having been renewed until 3 March 2000. However, it is plain from the events that occurred in the four months prior to the impugned decision that he was bound to have legitimate expectations that his contract would be renewed. He maintains that the Director of the BDT gave him oral assurances to that effect.

CONSIDERATIONS

1. The complainant was recruited by the ITU in 1995 to serve in the Telecommunication Development Bureau (BDT). His first-level supervisor informed him in a memorandum of 29 February 2000 that his appointment would not be renewed when it expired on 3 March 2000.

On 6 March and 12 April 2000 the complainant asked the Secretary-General to reconsider that decision. The Secretary-General replied on 22 May that he upheld the decision of 29 February.

2. The complainant appealed to the Appeal Board on 12 July 2000. Thereafter, he wrote several times to its Chairman seeking consideration of his appeal within the prescribed time limit. Having received no reply he has come to the Tribunal challenging the implied rejection of his appeal.

Receivability

3. Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of a complainant's rights. An official may come straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable period of time, the latter being determined in the light of circumstances (see Judgment 2039, *in re Bousquet* Nos. 5, 6 and 7; as well as Judgments 1829, *in re Müller-Engelmann* and 1968, *in re Concannon* and the numerous judgments cited therein).

Those conditions are obviously fulfilled in the present case. His endeavours to get a response having failed, the complainant could hardly be expected to wait any longer as there was no indication that a prompt conclusion from the Board was likely. The Tribunal therefore takes the view that he exhausted the internal means of redress.

The merits

4. According to the case law, although a decision not to renew a fixed-term or short-term appointment is a discretionary one, it does not fall

entirely outside the scope of review by the Tribunal. Such a decision will be set aside if it shows some flaw such as lack of authority, breach of formal or procedural rules, mistake of fact or of law, disregard of essential facts, misuse of authority or the drawing of clearly mistaken conclusions from the evidence.

Are the contested decisions tainted by any of those flaws?

5. According to the complainant, he had been given assurance that his contract would be renewed. The Union demurs: he received no such assurance from anyone with the authority to give it, namely the Secretary-General or the Director of the BDT. The Tribunal finds nothing in the evidence to bear out the complainant's assertions. As to witnesses, the complainant does not apply for hearings but cites the names of several people, leaving the Tribunal to decide whether or not they should be heard. In the absence of sufficient information as to the facts they would be able to prove, the Tribunal sees no reason to hear them.

6. A steady line of precedent has it that in the event of non-renewal of a fixed-term appointment, there must be a definite decision and it must be notified to the official. In addition, it must be founded on grounds that are valid and of which the official must be duly informed with "reasonable notice" so that he may exercise his right to appeal if he wishes (see Judgments 1544, *in re* Gery-Pochon, and 1583, *in re* Ricart Nouel, and the others cited therein).

The complainant objects that he was told about the non-renewal on the very day that his contract expired, the memorandum of 29 February not having reached him until 3 March 2000.

The ITU retorts that it so advised him several months in advance. It offers no evidence whatsoever of that assertion, however. On the contrary, the complainant's appointment which was originally due to end on 31 July 1999 was finally renewed; thereafter, his first-level supervisor even set in motion the formalities for a further renewal.

The conclusion is that the ITU has failed to prove that it discharged its duty to warn the complainant about the non-renewal long enough in advance to enable him to exercise his rights and take whatever steps he saw fit.

7. The complainant objects that the ITU failed to account for the decision in the memorandum of 29 February 2000 not to renew his contract.

The case law requires an organisation to give its reasons for non-renewal so that the Tribunal may review its decision. They may be clarified in some document subsequent to the decision. In this case the Secretary-General's letter of 22 May 2000 to the complainant accounted amply for the non-renewal of his appointment.

8. The complainant pleads abuse of authority.

Precedent says that there will be abuse of authority where the Administration, though not overstepping its authority, uses it for some purpose other than those prescribed by law or, to put it more broadly, those that the general interest requires. A staff member who pleads misuse of authority, and the tribunal that allows the plea, must be able to identify the improper purposes for which the authority (in this case the authority not to renew a short-term appointment) has been exercised.

Since the Director of the BDT has a duty to act in the interests of the Union, it must be ascertained whether those interests were the basis for the impugned decisions.

The ITU contends that the complaint is unfounded. It asserts that the decision not to renew the complainant's appointment was taken in its own interests. It took account of the Union's budgetary difficulties and its need to pursue not just priorities but other activities as well, including those previously carried out by the complainant. But, it says, renewal of its contractual relationship with the complainant was not essential to the continuation of the work he had been doing. In the Union's view, the

complainant has failed to prove that his previous duties were affected by the new operational arrangements decided on by the Director of the BDT.

The complainant retorts that the facts show that the Director of the BDT did not abide by the guidelines in the resolutions and decisions of the ITU's governing bodies concerning the Union's new role in the area of environmental protection. That, he says, is confirmation that the decisions taken by the Director of the BDT and approved by the Secretary-General – concerning the non-renewal of his contract and the fate of his work after he left – were not in the ITU's interests.

The complainant has failed to show that the contested decisions were in some other interest than that of the service. Nor is there any proof that the Director of the BDT declined to renew the complainant's contract simply because the former Director and the complainant share the same nationality. The Director's decision was dictated by the need to address budgetary problems and the fact that the complainant did not have to be kept on in order for his previous duties to continue. In the absence of any other evidence to support it, the plea of abuse of authority fails.

9. In Judgment 245 cited by the complainant, the Tribunal found that the complainant's fixed-term appointment ought to be "extended" because he needed only thirteen days' service more to complete the five years of contributions which would entitle him to benefit from the Pension Fund. In the present case, the complainant is not in a comparable position as he was on short-term appointments and was approximately one year short of entitlement to a retirement pension. That being so, a waiver of the rules would appear unwarranted.

10. For all the foregoing reasons, the Tribunal concludes that the impugned decisions were flawed by the Union's delay in informing the complainant of the non-renewal. As a result, he has suffered material and moral injury warranting redress in the form of payment by the ITU of an amount equal to two months of his last net salary without deduction of contributions to the Pension Fund.

DECISION

For the above reasons,

1. The contested decisions are set aside.
2. The Union shall pay the complainant an amount equal to two months' salary in material and moral damages, in accordance with what is said under 10 above.
3. It shall pay him 6,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

NINETY-SECOND SESSION

In re Axmann

Judgment No. 2105

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Georg Eduard Herbert Axmann against the World Health Organization (WHO) on 27 March 2001, the WHO's reply of 2 July, the complainant's rejoinder of 20 August, and the Organization's surrejoinder of 5 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian national born in 1954, joined the WHO in February 1988 at grade P.4. He was promoted to grade P.5 in 1993, following the reclassification of his post, and in 1995 to grade P.6 following reassignment to another post.

Following the election of the new Director-General of the WHO in May 1998, the Department of Budget and Management Reform (BMR) was established at WHO Headquarters to provide "a clearly identified focal point for the Organization's management reform efforts" and the complainant's post was placed in this new department. The department consisted of two units, one of which was named Management Reform (MRF). Post descriptions for all posts in BMR were to be redrafted and,

if necessary the posts would be reclassified, to fit the new structure. This was explained to the complainant by his supervisor, the Director of BMR, in a meeting on 24 February 1999. In the months that followed it became apparent that changes to the complainant's post would eventually lead to its being downgraded, although not before a formal classification process was carried out.

On 11 June 1999 the complainant sent a memorandum to the Director of BMR expressing concern about his professional future and asking that consideration be given to transferring him to the P.6 post of Coordinator in MRF. The Director replied in a memorandum of 15 June that the complainant was welcome to apply for the post in question once the vacancy notice had been posted. On 30 July vacancy notice P99/110 was issued for the post and the closing date for applications set at 4 September 1999. The complainant submitted his candidature on 12 August.

On 2 September the Director of BMR sent a memorandum to the Director of Human Resources Services (HRS) to inform him that he wished to hold the filling of the Coordinator post in abeyance for six months and asked that all applicants be notified. In a letter of 29 September the Coordinator of Central Services in HRS informed the complainant of the decision not to fill the vacancy at the present time "due to organizational changes". On 17 November 1999 the Director of BMR, answering an earlier memorandum sent by the complainant, told the latter that although he did not share the complainant's view regarding his qualifications for the post of Coordinator, the complainant would nevertheless be welcome to reapply for it when it was readvertised, "probably towards the end of 2000".

On 13 March 2000 the Director of Administration and Finance in the Regional Office for Europe - Ms T. - was reassigned to Headquarters in the post of Coordinator in MRF.

On 4 April the complainant sent a memorandum to the Director-General requesting that the decision to fill the post of Coordinator be set aside and that the selection process, under vacancy notice P99/110, be reactivated. On 30 June the Executive Director of the General Management Cluster (GMG) responded to the complainant on the

Director-General's behalf. She informed the complainant that it was "within the Director-General's prerogative" to reassign a staff member – without promotion and without holding a competition – to a post below the level of Director. Furthermore, in this instance it was in the Organization's interest to do so.

On 4 July 2000 the complainant filed a notice of intent to appeal, seeking to impugn the appointment of Ms T. because the WHO had disregarded the rules governing the filling of posts. The relevant provisions are as follows:

WHO Staff Rule 410.4:

"Posts below the level of director, other than those of a short-term nature, which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion."

WHO Manual paragraph II.3.50:

"Vacant posts are announced in accordance with Staff Rule 410.4 ..."

Manual paragraph II.3.60:

"An announcement is not normally made:

...

60.2 if the post can be filled by the reassignment of a staff member without promotion, provided that it is a post in the speciality for which the staff member is qualified and the proposed reassignment does not entail a move from a project to a regional office or from a region to headquarters."

In its report dated 7 December 2000 the Headquarters Board of Appeal found no reason to set aside the appointment of Ms T., but nevertheless considered that "the way in which the appointment had been handled by the Administration was a major cause of the appeal" and recommended that a maximum of 4,000 Swiss francs be paid towards the complainant's legal expenses. In a letter of 2 February 2001 the Director-General informed the complainant that she endorsed the Board's recommendation that the appointment of Ms T. should be allowed to stand but saw no basis to award the payment of legal fees. That is the impugned decision.

On 1 January 2001 the complainant was reassigned to a P.5 post in MRF. It was agreed that he would retain his P.6 grade on a personal basis.

B. The complainant makes three pleas. First, he argues that the WHO disregarded the rules governing the filling of posts. He contends that the Director of BMR only suspended action on vacancy notice P99/110 for six months in order to allow for some organisational changes. However, there were no organisational changes affecting this particular post, therefore the selection process should have been reactivated. Although it is permissible to forego a vacancy notice, in this case one was required under Manual paragraph II.3.60 because the reassignment concerned transferring a staff member from a regional office to Headquarters. This provision is designed to regulate the exercise of discretion granted to the Director General under Staff Rule 410.4. To justify its decision the WHO has claimed that it was taken in "the interest of the Organization", but, the complainant submits, the defendant has failed to explain how this is so. In his view, the interest of the Organization would have been better served by proceeding with the "normal" selection process and even the Board of Appeal noted that it found no reason why the usual procedures were not followed. There were other procedural flaws as well. In recommending the reassignment of Ms T. to the post of Coordinator, the Executive Director of GMG referred to qualifications that were not required in vacancy notice P99/110 and the complainant considers this to be "improper". He asks the Tribunal to conclude from the aforementioned that the decision was tainted by illegality.

Secondly, the WHO disregarded its obligation to the complainant - as a staff member whose previous functions on a P.6 grade post had been abolished - to try to place him in a post with responsibilities corresponding to his grade. There is a long line of the Tribunal's cases which define an organisation's duties towards a staff member when the latter's "status and functions" are affected by restructuring measures. The measures taken to fill the post of Coordinator by direct selection "wholly disregarded the complainant's rights and interests".

Lastly, he submits that there was personal prejudice on the part of his supervisor and recalls an observation made by the Tribunal in its case law that prejudice "is usually concealed and so its existence usually has to be

established by inference". He alleges that the appointment of Ms T. was tainted by prejudice and he provides reasons why he believes this to be true.

He requests the Tribunal: to set aside the appointment of Ms T. to the post of Coordinator in MRF and to order the resumption of the selection process in accordance with vacancy notice P99/110; to order the payment of a "just and equitable" sum in compensation to him for moral injury and damage to his professional standing and career; and to order the payment of 10,000 Swiss francs for legal costs and expenses. He also asks the Tribunal to order the production of two documents: the curriculum vitae of Ms T. and a draft memorandum dated 14 January 2000.

C. In its reply the WHO rebuts the complainant's arguments, stating that the reassignment without promotion of another staff member to the post of Coordinator complied with the express wording of Staff Rule 410.4. The reassignment was "clearly" in the interest of the Organization.

The Organization points out that the memorandum dated 2 September 1999 from the Director of BMR to the Director of HRS - which the complainant cites as proof that the competition had not been abandoned - was not sent to him. The competition announced in vacancy notice P99/110 was cancelled on 29 September 1999 and all candidates were so informed. Furthermore, in the memorandum of 17 November the Director of BMR told the complainant that he could apply for the post of Coordinator whenever it was readvertised. He should have had no doubts as to the status of the competition.

Due to the organisational changes, the vacancy notice for the post of Coordinator in MRF no longer reflected the true extent of the duties of the post, or the skills and experience necessary to carry these out, nor did the complainant possess the necessary qualifications to fill this post as changed. Ms T. was amply qualified for the post; there was also "an urgent need to fill the position" and she was able to take up her duties very promptly. If the post were to be filled by competition it would have taken up to six months longer and it is "self-evident" that the work in MRF "could not proceed smoothly and expeditiously" without the post being filled on a permanent basis.

The WHO submits that filling the post through the reassignment of Ms T. without holding a new competition did not breach Manual paragraph II.3.60. The use of the word "normally" in that paragraph provides the Organization with a flexibility to proceed with a direct reassignment without announcing a vacancy. This interpretation is supported by the case law.

It adds that there was no breach of any obligation towards the complainant regarding finding him a post with senior level responsibilities. Although he was informed that the restructuring in BMR would lead to the downgrading of his post there is nothing to suggest that he was not assigned duties commensurate with his grade. In fact, the complainant was still carrying out senior level assignments while the WHO tried to identify a suitable reassignment for him. He was eventually offered and accepted a P.5 level post in BMR for which he kept the P.6 grade on a personal basis.

Lastly, the Organization denies the complainant's allegations that the decisions to cancel the competition and to reassign Ms T. were motivated by personal prejudice on the part of his supervisor.

Regarding the complainant's request for the curriculum vitae of Ms T. the WHO expresses its readiness to provide this document if the Tribunal orders it to do so. As for the draft memorandum dated 14 January 2000, this has been attached as an annex to the reply.

Ms T. was invited to provide her comments on the complaint. She rebuts the complainant's allegations against her qualifications and selection for the post.

D. In his rejoinder the complainant submits that the Organization has tried to misrepresent the position he takes in his complaint. He has never stated that there is an obligation to place him in a P.6 post, nor has he claimed that he should have had priority consideration in the filling of the post of Coordinator. What he sought was "a fair chance" to compete for the post and he stresses that a regular selection process was in the interests of all parties.

The complainant's request in his memorandum of 11 June 1999 to the Director of BMR that consideration be given to transferring him to

the Coordinator post should be seen in the light of the circumstances prevailing at that time: it was sent before the vacancy notice had been issued, the post he occupied at the time was to be downgraded, the post of Coordinator was due to fall vacant that year, the Organization had an obligation to try to place him in a post at a level of responsibility corresponding to his grade, and his transfer under these circumstances would not have breached any of the WHO's rules or regulations. By contrast, the reassignment of Ms T. to the post of Coordinator was made under entirely different circumstances: she was not in danger of being demoted, there was no obligation to try to find her another assignment, and her transfer from a regional office was barred by Manual paragraph II.3.60.

He now argues that the Director-General's decision to reassign Ms T. failed to take account of essential facts and warrants review by the Tribunal.

E. In its surrejoinder the WHO maintains its argument that there has been no breach of either Manual paragraph II.3.60 or Staff Rule 410.4. The selection process which began with the issuance of vacancy notice P99/110 was abandoned at the end of September and the complainant was duly informed. There is no point in "reactivating" the competition. The rules do not require that the Organization issue a vacancy notice every time a staff member is reassigned from a region to headquarters on a vacant post, they only state that this is "normally" done.

The Organization submits that the Director-General was fully apprised on all relevant facts and issues prior to taking the decision to reassign Ms T. The complainant's allegations to the contrary are without merit.

CONSIDERATIONS

1. The complainant was employed by the WHO in February 1988 at grade P.4. He was promoted to grade P.5 in 1993 and to P.6 in 1995.

2. In 1998, following structural reforms, the Department of Budget and Management Reform (BMR) was established and the unit in which the

complainant worked was abolished. The complainant was transferred to BMR with his P.6 grade.

3. The complainant's supervisor until the end of 1993 had been transferred to the WHO Regional Office for Europe and was retransferred to WHO Headquarters and appointed Director of BMR in November 1998. In line with the structural reforms, BMR was to consist of only two units, although posts from three different entities were transferred to that Department. One of the units was called Management Reform (MRF) and that is where the complainant was assigned. Post descriptions were to be redrafted and reclassified accordingly. At a meeting on 24 February 1999, the Director of BMR explained to the complainant that there might be a change to the grade of his post, but not before a formal classification process was carried out.

4. Under the revised post description, the complainant realised that his post would be at a "substantially lower level of responsibilities" than those of his present grade. Hence, on 11 June he wrote to the Director of BMR, stating that he trusted that "the Organization will make all reasonable efforts to find [him] a position corresponding to [his] grade and responsibilities, background and experience". He concluded by expressing his wish to be considered for the position of Coordinator in MRF. The Director replied to the complainant in a memorandum of 15 June 1999 that he understood the complainant's concerns and he had therefore asked the Director of Career Development to follow-up with the complainant in this regard; he added that the complainant would be welcome to apply for the position of Coordinator in MRF when the vacancy notice was posted. On 12 August the complainant submitted his application for that position, but the Human Resources Services informed him on 29 September that it had been decided not to fill the vacancy due to organisational changes.

5. The Director of Career Development met with the complainant on 8 November 1999, informing him of the availability of a post, for which he would be qualified, in the WHO Regional Office for Africa as Administrative and Finance Officer. Although the post was graded at the P.5 level, he would be allowed to keep his P.6 grade on a personal basis,

subject to the agreement of the Director-General. The complainant stated that he could not consider a post classified lower than P.6.

6. By a memorandum dated 11 November 1999, the complainant explained to the Director of Career Development that since he wished to obtain an assignment to a post with responsibilities corresponding to his grade, he had applied for the post of Coordinator in MRF, a P.6 vacancy "squarely within [his] specific area of competence". He was informed by his Director, to whom he sent a copy of the memorandum, that the subject post did not fall within his specific area of competence, which are "management studies and organizational analyses", whereas the vacant post required "extensive background and specialization in programme evaluation in terms of knowledge, practical experience and academic qualifications".

7. On 13 March 2000 Ms T. was reassigned from the D.1 post of Director of Administration and Finance in the WHO Regional Office for Europe to the P.6 post of Coordinator in MRF.

8. On 4 July 2000 the complainant appealed against that appointment. In its report dated 7 December 2000 the Headquarters Board of Appeal recommended to the Director-General that Ms T.'s appointment be allowed to stand; since it had not damaged the complainant's professional standing or career it decided not to recommend the payment of compensation on these grounds. However, the Board recommended the payment of up to a maximum of 4,000 Swiss francs to cover the complainant's legal costs due to "the inappropriate manner in which the Administration had dealt with the appeal itself".

9. The Director-General, in a letter dated 2 February 2001 to the complainant, stated that she was in agreement with the Board of Appeal's recommendation to let the appointment of Ms T. to the post of Coordinator in MRF stand, but she did not agree with its recommendation regarding the payment of legal fees. That is the impugned decision.

10. In his submissions, the complainant requests the Tribunal to set aside the appointment of Ms T. to the post of Coordinator in MRF, and to order the resumption of the selection process for filling the said post in accordance with vacancy notice P99/110. He also wants to be awarded 10,000 Swiss francs for legal costs and expenses.

11. The Organization based the reassignment of Ms T. on Staff Rule 410.4 which, it says, allows the filling of a post by reassignment not involving a promotion, when it is in the interest of the Organization.

12. On the other hand, the complainant argues that such a reassignment violates Manual paragraph II.3.60 which rules out reassignment of a staff member without promotion and without issuing a vacancy notice where the reassignment entails a move from a region to headquarters.

13. Staff Rule 410.4, while stating as a general rule that posts below the level of director which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and that selection for such posts shall normally be on a competitive basis, explicitly removes from the coverage of its terms by way of exception "any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion".

14. The appointment of Ms T. to the post of Coordinator was made after an announced competition, in which the complainant participated, had been cancelled since "it had been decided not to fill [the] vacancy at this stage due to organizational changes".

15. In the aftermath of the organisational changes the Director-General decided to give BMR the responsibility for developing a global Information Technology policy. Consequently, the post description for the Coordinator in MRF, who would have to assume directly that responsibility, was revised. Because of the additional duties now required of the post, the former qualification of being "computer literate" was changed to also having "extensive knowledge of information

and communications technology, including in-depth knowledge of the application of such technology in large, complex organizations".

16. Considering that it was "in the interest of the Organization" to fill the vacancy by direct selection and not by competition, and that Ms T. as Director of Administration and Finance in the WHO Regional Office for Europe, had ample experience in management reform and IT policy at a senior level, as well as experience in working in a regional office, the Director-General decided to reassign her to the post of Coordinator in MRF.

17. As is clear from precedent what is "in the interest of the organization" as to warrant an exception under Staff Rule 410.4 should be left to the Organization to decide. The Director-General's discretion in this regard may be exercised to the detriment of the interests of the individual affected. Moreover, that is "in keeping with the general principles of international public service, which affirm the priority of the general interest, represented in each organisation by the Director-General, over individual interests" (Judgment 325, *in re Verdrager*).

18. The complainant contends that Ms T.'s reassignment violates Manual paragraph II.3.60 which allows a reassignment without announcement provided that it does not entail a move from a region to headquarters. Since Ms T's reassignment was from a regional office to Headquarters, there should have been a vacancy notice issued for the post.

19. A close reading of Manual paragraph II.3.60 shows that it does not require that the Organization issue an announcement in all cases. The relevant statement declares: "An announcement is not normally made ...". The use of the word "normally" allows exceptions to be made and it is the prerogative of the Director-General to exercise his/her discretion provided he/she does not do it in an arbitrary manner or in violation of the relevant Staff Rules and Staff Regulations.

20. The complainant not only asks for the setting aside of the appointment of Ms T. but likewise for the resumption of the selection

process for filling the said post in accordance with the vacancy notice P99/110.

21. In upholding the decision to appoint Ms T., the Tribunal rejects the claim to the reactivation of the competition process. Under the internal rules of the Organization, the Director-General has the discretion to fill a post by means other than a competition. The Tribunal will not interfere with such exercise of discretion as long as there is no abuse of authority, and there was not.

22. The Director-General cannot be taken to task for effecting necessary and desired reforms. If, in her discretion, this meant abandoning a competition which had been announced, she was within her rights in so doing.

23. By transferring a qualified official the Organization permanently filled a post which had had no staff on a permanent basis for seven months. There is no gainsaying the fact that such an appointment was more expeditious than resuming or starting a competition with revised qualifications.

24. The complainant asks for an award by way of compensation for moral injury and damage to his professional standing and career. This claim hinges on the success of the claims to set aside the direct appointment of Ms T. and to order the resumption of the selection process. Since the complainant does not succeed in those claims, this claim also fails.

25. It follows also that he is not entitled to an award for legal costs and expenses.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

Flerida Ruth P. Romero

FLERIDA RUTH P. ROMERO



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Ball

Judgment No. 2106

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Andrew Lee Ball against the World Health Organization (WHO) on 24 November 2000 and corrected on 5 March 2001, the WHO's reply of 5 June, the complainant's rejoinder of 12 September, and the Organization's surrejoinder of 26 October 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1957 and is of Australian nationality. In 1991 he joined the WHO at grade P.3 as a short-term professional in the Programme on Substance Abuse (PSA), which in December 1998 became the Substance Abuse Department (SAB). From 1 April 1995, the complainant was given a fixed-term contract as a medical officer at grade P.4.

Management changes took place within the PSA as from 1996. An Acting Programme Manager took over on 5 May 1998 until October 1998 when a new Programme Manager took up her duties. In late October a one-page "*aide-mémoire*" was left on a shared printer and subsequently leaked to persons outside the PSA. Believing that the complainant was involved, the Programme Manager, his first-level supervisor, sent him a memorandum dated 9 November 1998 in which she asked him to place his signature against one of two statements, indicating whether or not he had been responsible for conveying the information outside the department. He signed against the "no" option and in a memorandum of even date denied involvement. By a memorandum of 4 June 1999 his supervisor issued the complainant with a written warning as she believed he had acted contrary to her instructions by circulating copies of a draft training manual he had previously been responsible for developing.

In mid-1999 his supervisor and former supervisor both completed the complainant's appraisal report for the period from 1 April 1998 to 31 March 1999. His former supervisor's evaluation covered the period up to 30 November 1998. The report contained unfavourable comments and included a recommendation that his within-grade salary increase be withheld for twelve months. In November 1999, at his own request, the complainant was transferred to the Department of Child and Adolescent Health and Development.

On 2 December 1999 the complainant appealed to the Headquarters Board of Appeal against the contents of his 1998-99 appraisal report and the decision to withhold his step increase. In its report of 16 June 2000 the Board found that the performance report had not been drawn up in accordance with Staff Rule 530. The Board recommended cancelling the report but since it would not be feasible to ask his supervisors to produce another one it recommended offering the complainant one of three alternatives. It also recommended quashing the decision to withhold the step, and removing the memorandum of 9 November 1998 from all relevant files.

By a letter of 18 August 2000, which the complainant impugns, the Director-General told the complainant that his step would be retroactively restored and he would receive the corresponding amount of salary due.

She agreed that the memorandum of 9 November 1998 would be removed from his personal file, but said she would stay a decision with regard to his appraisal report. The Working Group on Harassment would first examine his allegations of harassment and provide her with a report and a recommendation. When that had been done she would decide on appropriate action with regard to the appraisal.

The complainant filed his complaint with the Tribunal on 24 November 2000. He was informed in a letter of 4 June 2001 that, as announced in cluster notes 2001/9 and 2001/13, a Grievance Panel had been established and would deal with his case.

B. The complainant contends that the Organization failed to treat him with dignity and respect and offended against the Staff Rules and Regulations by issuing a "false and defamatory performance evaluation". He presses the pleas put forward in his internal appeal and wants the relief he sought therein to be granted in full.

First, he alleges personal prejudice on the part of two supervisors and two other officials in the Department. He says he suffered "multiple instances" of psychological harassment and misconduct, which the Organization did nothing to prevent, thereby failing in its duty of care towards him.

Secondly, he submits that his 1998-99 appraisal report overlooked essential facts and cited inaccurate ones. Neither supervisor gave concrete examples of his alleged unsatisfactory performance. The report had no "proper basis" and ultimately caused him to lose his within-grade increase, and affected his chances of promotion. The contents of the report constitute further evidence of "malice ... and discrimination" against him.

Thirdly, he argues that the discriminatory actions of his supervisors were "directly aimed" at preventing him from obtaining a transfer, and caused him moral and professional injury.

He wants the Tribunal to order the quashing of the 1998-99 appraisal report and order the WHO to provide an "unbiased and unprejudiced" evaluation of his performance over the same period. He wants to be allowed to work on any issues commensurate with his experience and expertise, even those involving substance abuse. He further seeks:

apologies from his supervisors and an admission from the WHO that his supervisors' actions amounted to psychological harassment and to "misconduct" under Staff Rule 110.8; the reclassification of his current post to grade P.5, or promotion to that grade as from 25 November 1997 and an amount representing the loss of salary incurred through not having his post reclassified at that time; the removal from the files of the memorandum he was asked to sign on 9 November 1998; the destruction of the written warning dated 4 June 1999; moral damages for "defamation" and for stress experienced as a result of the harassment; an investigation into his supervisor's "interference" with his applications for two posts; interest on sums found due from 1 December 1999; 25,000 United States dollars in costs; and such other relief as the Tribunal deems necessary.

Lastly, he requests the Tribunal to call for the presentation by the Organization of correspondence or documents, in whatever form, that would shed further light on the subject matter of his grievances.

C. The Organization replies that it was the decision to withhold the step increase that triggered the complainant's internal appeal. Since his step increase has been retroactively restored he shows no cause of action with respect to that decision.

The Organization argues that his allegations of harassment were being investigated within the framework of an established procedure. Delays were encountered in appointing a panel and at the time of filing the reply the Director-General had not yet received the Grievance Panel's advice. As she has so far not taken a final decision on the harassment issue, that aspect of the complaint remains irreceivable, as does any claim to moral damages arising therefrom. Upon receipt of the Panel's report the Director-General will also take a decision on the 1998-99 appraisal report. Meanwhile, that aspect of his complaint is irreceivable too.

The same applies to his request for the destruction of the warning of 4 June 1999. The Grievance Panel will consider whether the issuance of that memorandum constituted an act of harassment. The Acting Director of Human Resources Services told the complainant in a letter of 7 February 2001 that no action could be taken regarding that warning until

l'avis de cette commission. Etant donné qu'aucune décision définitive n'a encore été prise sur la question du harcèlement, cet aspect de la requête est irrecevable, de même que toute conclusion tendant au paiement de dommages-intérêts pour tort moral qui en découlerait. Lorsqu'elle aura reçu le rapport de la commission, le Directeur général prendra également une décision sur le rapport d'évaluation pour 1998-99. Tant que cette décision ne sera pas prise, cet aspect de la requête sera lui aussi irrecevable.

Il en va de même concernant la conclusion tendant à la destruction de l'avertissement du 4 juin 1999. La commission d'enquête examinera la question de savoir si ce mémorandum était constitutif d'un acte de harcèlement. Le directeur des ressources humaines par intérim a informé le requérant, par lettre du 7 février 2001, qu'aucune mesure ne serait prise en ce qui concerne cet avertissement tant que la commission n'aurait pas examiné son cas. Il lui a également fait savoir que le mémorandum du 9 novembre avait été retiré de son dossier et détruit; le requérant ayant obtenu satisfaction sur ce point, il n'a plus aucun intérêt pour agir. Pour ce qui est de sa conclusion tendant au reclassement de son poste actuel, il peut engager la procédure officielle en vigueur. La conclusion relative au reclassement du poste qu'il occupait précédemment au PSA a été considérée comme n'entrant pas dans le cadre de son recours interne, elle est donc elle aussi irrecevable.

Sur le fond, l'Organisation affirme que, bien que le requérant ne soit pas d'accord avec les observations faites par ses deux supérieurs hiérarchiques dans le rapport contesté, celles-ci reposaient sur des preuves. Les deux supérieurs ont en effet fourni des exemples spécifiques des domaines dans lesquels il devait s'améliorer. L'évaluation du travail du requérant a été faite en pleine conformité avec les règles de procédure applicables. Le requérant a été dûment informé des préoccupations de ses supérieurs, et a eu la possibilité d'en discuter.

Elle conteste que sa supérieure hiérarchique ait interféré dans sa candidature à deux postes. En effet, en ce qui concerne l'un de ces postes, le requérant n'avait pas posé sa candidature et quant à l'autre, il a été informé fin 1999 qu'il n'avait pas été retenu, or il n'a pas fait appel de cette décision.

D. Dans sa réplique, le requérant déclare que l'Organisation ne peut raisonnablement faire valoir qu'il n'y a pas eu de décision définitive sur la question du harcèlement. Le fait que la commission d'enquête et le Directeur général n'ont pas pris de décision définitive doit être interprété comme un rejet implicite de sa demande de réparation, ce qui rend la partie de sa requête concernant cette question recevable. Ce manquement a porté atteinte à sa capacité de présenter l'ensemble des éléments de son dossier au Tribunal. Il prend note du fait que l'Organisation n'a pas produit les documents qu'il avait demandés dans sa requête.

Il nie avoir obtenu satisfaction quant au mémorandum du 9 novembre 1998. En effet, son ancienne supérieure hiérarchique au SAB a révélé dans une déclaration soumise à la commission d'enquête le 6 août 2001 qu'elle en détenait encore une copie.

E. Dans sa duplique, l'Organisation réitère ses arguments. A la date à laquelle ce mémoire a été soumis, le Directeur général n'avait pas encore pris de décision au sujet des allégations de harcèlement et du maintien du rapport d'évaluation. Les travaux de la commission d'enquête n'en suivent pas moins leur cours, et un rapport sera bientôt envoyé au Directeur général. L'OMS nie qu'il y ait eu «rejet implicite» de la demande de réparation pour harcèlement dont le requérant aurait fait l'objet. Il a fallu plus longtemps que prévu pour régler ce problème de harcèlement mais cela n'est en aucun cas imputable à un manque de bonne volonté de la part de l'Organisation.

L'OMS joint à sa duplique une copie des dénégations des personnes que le requérant accuse de s'être livrées à un harcèlement — dénégations qui ont été soumises à la commission d'enquête. L'Organisation reconnaît que, dans la déclaration qu'elle a signée, l'ancienne supérieure hiérarchique du requérant déclarait qu'elle avait encore en sa possession une copie du mémorandum signé du 9 novembre 1998, mais fait remarquer que la copie qui figurait dans le dossier personnel confidentiel du requérant en a été retirée puis détruite. Les autres documents ne peuvent pas être retirés du dossier tant que la commission n'a pas terminé ses travaux.

CONSIDÈRE :

1. La présente requête trouve son origine dans un rapport annuel d'évaluation défavorable. Ce rapport couvrait la période du 1^{er} avril 1998 au 31 mars 1999 et avait été établi par la supérieure hiérarchique directe du requérant, le Dr J. Il contenait des observations de son précédent supérieur hiérarchique, le Dr A. La suspension de l'augmentation d'échelon du requérant dans la classe y était recommandée, et cette recommandation a été suivie.

2. L'intéressé a saisi le Comité d'appel du siège pour contester ce rapport d'évaluation et la décision de suspendre son augmentation d'échelon. Il faisait valoir que pendant des années il avait été victime de harcèlement psychologique. Dans son rapport daté du 16 juin 2000, le Comité a considéré que le rapport d'évaluation était entaché d'une erreur de procédure. Il a relevé que les dispositions pertinentes, à savoir l'article 530 du Règlement du personnel, et les instructions figurant sur le formulaire n'avaient pas été respectées, notamment compte tenu du fait que les supérieurs hiérarchiques du requérant n'avaient pas discuté de leurs observations avec celui-ci avant de les porter sur son rapport d'évaluation. Le Dr A. avait pris sa retraite en novembre 1998 et le requérant ne pouvait donc plus s'entretenir avec lui. Le Dr J. avait suivi la recommandation du Dr A. de ne pas accorder l'augmentation d'échelon, mais sans avoir au préalable vérifié les déclarations du Dr A. ni obtenu des preuves concordantes. Il n'existait aucune preuve que le contenu du rapport avait fait l'objet d'une discussion entre le Dr J. et le requérant ou entre le requérant et son supérieur hiérarchique au deuxième niveau. Le Comité a fait remarquer qu'un supérieur hiérarchique est certes en droit d'évaluer de manière défavorable la qualité d'un travail, mais qu'il doit en discuter au préalable avec l'intéressé et s'appuyer sur de solides preuves. De plus, un supérieur hiérarchique au deuxième niveau a le devoir de vérifier le bien-fondé d'une évaluation défavorable émanant d'un supérieur hiérarchique direct; or rien n'indique que tel ait été le cas en l'espèce.

3. Le Comité a examiné les questions relatives au contenu du rapport. Il a relevé que, dans les rapports d'évaluation précédents du requérant, sa compétence professionnelle dans sa spécialité n'était pas mise en doute. Il a examiné les allégations de harcèlement dont l'intéressé prétend avoir fait l'objet et a fait remarquer en particulier que certains éléments importants, venant s'ajouter à plusieurs incidents mineurs décrits par le requérant et que l'administration n'a pas nié, avaient créé un «climat de travail hostile» justifiant le «sentiment d'être harcelé» dont se plaignait le requérant.

4. Le Comité a conclu que le rapport d'évaluation du requérant n'ayant pas été établi conformément aux dispositions de l'article 530 du Règlement du personnel, il n'était pas valable. Il a par ailleurs estimé que c'était à juste titre que le requérant s'était senti harcelé. Il a souligné que ce sentiment aurait dû être pris au sérieux, mais que l'Organisation avait laissé longtemps perdurer une situation conflictuelle.

5. Le Comité a principalement recommandé que le rapport d'évaluation contesté soit annulé et que le requérant se voit offrir le choix entre a) le retrait de ce rapport, b) son retrait avec insertion d'une note explicative dans son dossier ou c) un nouveau rapport expurgé de toutes les observations négatives. Il a recommandé la restauration rétroactive de l'augmentation d'échelon du requérant dans la classe, le retrait de tous les dossiers du mémorandum contesté daté du 9 novembre 1998, et le paiement au requérant de 7 500 dollars des Etats-Unis à titre de réparation pour le stress subi.

6. Par lettre du 18 août 2000, le Directeur général a décidé que :

- i) l'augmentation d'échelon serait accordée au requérant rétroactivement car il n'était pas «évident que les insuffisances relevées dans son rapport d'évaluation fussent prépondérantes par rapport aux éléments positifs dénotant la qualité de [son] travail»;
- ii) le mémorandum du 9 novembre 1998 serait retiré de son dossier personnel;

evaluation procedure. He was not afforded an opportunity to discuss matters with his supervisors. The complainant invites the Tribunal to adopt the conclusion of the Board of Appeal that the appraisal was not conducted in line with Rule 530 and should therefore be considered invalid.

10. His third argument is that the discriminatory actions of his supervisors obstructed his efforts to obtain a transfer and caused him harm. But this argument is irrelevant as it is outside the parameters of the complaint.

11. The complainant also requests the production of documents relating to his allegation of harassment and administrative action taken by Dr J.

12. The Organization asserts that it was the decision to withhold the complainant's within-grade salary increase that triggered his internal appeal, but since that decision was overturned and his step increase was retroactively restored, the complainant no longer has a cause of action. It states that it is taking the harassment allegations seriously and that the Director-General has appointed a Grievance Panel to investigate the matter and draw up a report. She has not yet received the report and no decision on the merits has been taken. Since there is no final decision his claims based on harassment are irreceivable.

13. It further argues that the Director-General has also deferred taking a decision about the performance appraisal report pending receipt of the Grievance Panel's report, and, meanwhile, since no final decision has been taken, the claims related to his appraisal are also irreceivable.

14. The Tribunal considers that not only the withholding of the within-grade salary increase but also the actual performance appraisal report itself were challenged by the complainant and appealed to the Board of Appeal. Therefore it is not true that once the step increase was restored the complainant's cause of action disappeared. There still remains the issue of the appraisal report itself.

15. The allegations of harassment are being looked into. The Organization says delays were encountered in appointing a panel to carry out this investigation. The Director-General decided in August 2000 to refer the complainant's claims of harassment to an investigative panel, and it now appears from the Organization's surrejoinder dated 26 October 2001 that the Grievance Panel has commenced its work.

16. The issue of harassment and its impact on the negative aspects of the appraisal report as well as the validity of the report still remain to be dealt with as does the claim for compensation. When a final decision is made on these matters the complainant will have a right to appeal.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

NINETY-SECOND SESSION

In re Donoghoe

Judgment No. 2107

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Martin C. Donoghoe against the World Health Organization (WHO) on 14 September 2000 and corrected on 21 December 2000, the WHO's reply of 3 April 2001, the complainant's rejoinder of 15 June, and the Organization's surrejoinder of 28 September 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is of British nationality and was born in 1958. He joined the WHO's staff on 17 October 1994 under a short-term contract for 2.5 months as a technical officer at grade P.3. He subsequently had a series of short-term contracts of varying durations, with four breaks in service ranging between seven and sixteen days. He worked in the Programme on Substance Abuse which in December 1998 became the Substance Abuse Department. From September 1997 his job title became that of scientist and he held grade P.4.

A new Programme Manager was appointed in October 1998 and became the complainant's first-level supervisor. In a meeting with the

complainant on 1 April 1999 she voiced concerns about remarks that had been made in public and which could be construed as an attempt to undermine the reputation of the department. The complainant emphasised his commitment to the work of the Department. A personnel officer was present at the meeting as a neutral observer and produced a "note for the record" dated 9 April, which was subsequently placed on the complainant's personnel file.

In a memorandum of 16 April 1999 his supervisor told the complainant that "the funding situation" of the Department was "very uncertain", and that since the priorities of the Department were evolving in ways which required different qualifications than those he possessed, it appeared that she would not be in a position to renew his contract when it expired on 16 July. She confirmed that information in a memorandum of 5 July. The complainant subsequently appealed to the Headquarters Board of Appeal against his status as a "long-term short-term" employee of the WHO and the non-renewal of his contract. He claimed, *inter alia*, that he should be considered as a fixed-term staff member and that he was the victim of psychological harassment.

The Board reported on 20 March 2000 recommending that the decision not to renew the complainant's contract should stand. It nonetheless concluded that he had not been given proper notice of non-renewal inasmuch as the language in the memorandum of 16 April 1999 was "conditional" and the Organization only transmitted a clear decision to him on 5 July 1999. Because of that, it recommended that he should be paid a sum equivalent to the amount he would have earned if his contract had been extended for six months. The Board also recommended that an *ad hoc* grievance panel be set up to investigate fully his allegations of harassment.

In a letter of 20 June 2000, the impugned decision, the Director-General told the complainant that the Working Group on Harassment would review his allegations of harassment and provide her with a report on the matter. While she concurred with the Board's view that he should not be offered a further contract she pointed out that he had been given prior notification of non-renewal, even though by the terms of his contract no notice was required; she did not, therefore, accept the Board's

recommendation to pay him compensation. The complainant wrote to the Director-General on 21 July 2000 protesting against that decision. In order to allow for the consultations with the Working Group to take place, he indicated that he was prepared to wait until 15 August before lodging a complaint with the Tribunal.

The Working Group held meetings over a six-week period, met with the complainant on 18 September 2000, and subsequently produced a report. Similar allegations of harassment were made by another official in the SAB Department, which are at issue in Judgment 2106 (*in re Ball*), also delivered this day. Pending a report from the Grievance Panel constituted to hear that case the Director-General chose to defer taking a final decision on the present complainant's case.

B. The complainant is contesting his "involuntary" separation from service on several grounds. He contends that the Organization failed to treat him with dignity and respect, did not correctly apply the WHO Staff Rules and Regulations and offended against the principle of equal treatment by discriminating against him.

He alleges personal prejudice on the part of his supervisor and says he suffered "multiple instances" of psychological harassment which the Organization did nothing to prevent, thereby failing in its duty of care towards him.

He takes issue with what he terms the Organization's "practice of maintaining long-serving staff ... on short-term contracts". His nominal designation as a "short-term professional" during his nearly five years of service amounted to "irregular legal fiction". He was in an unfair situation, performing the same "core functions" as fixed-term officials without having the attendant benefits and emoluments. This resulted in unjust enrichment for the WHO and offended against the principle of equal remuneration laid down in international instruments. He claims that he was a *de facto* fixed-term staff member.

The Administration in his view failed to give him adequate notice that his contract would not be renewed. Because of the lack of clearly stated reasons his contract could be deemed renewed by implication. It was only on 5 July 1999 that the Organization notified him of the non-renewal. The

two reasons given by his supervisor for ending his contract were false. There was adequate funding for his functions and his work was simply taken over by three or four different colleagues. The decision not to renew his contract was tainted by the "prejudice and malice" of his supervisor, which amounted to abuse of authority. In addition, he claims that she caused his non-selection to a post he had applied for in another organisation. He says he also suffered moral injury as a result of the "defamatory" nature of the "note for the record" of 9 April 1999.

Among his main claims for relief he seeks: the quashing of the impugned decision; reinstatement from 16 July 1999 with payment of all salary and emoluments that he would have been entitled to from that date; a ruling that he was in fact and in law a fixed-term staff member, and had been since the completion of his first eleven and a half months of service, and back payment of emoluments due on that basis; moral damages because of harassment by his supervisor; an *ex gratia* payment as compensation for his non-selection to the post in question following the actions of his supervisor; interest on all sums awarded to him; a written apology from his supervisor admitting the "defamatory nature" of the "note for the record" of 9 April 1999; any other relief deemed necessary by the Tribunal; and costs.

He wants the Organization to produce all documents or correspondence that would shed light on the subject matter of his grievances.

C. In its reply the Organization asserts that as the Director-General has not yet taken a final decision as to whether the complainant's allegation of harassment is well-founded, that aspect of his complaint is irreceivable. It takes note of his request for what it terms "voluminous documentation", but considers that no further submissions are necessary.

It points out that the complainant accepted the contracts offered to him and was bound by their terms. Each one made it clear that he was being offered a short-term appointment. By alleging that he was a fixed-term staff member after his first 11.5 months of service he is seeking retroactive revision of almost 3.5 years of his career at the WHO. Yet, the stability of legal relationships requires that contractual terms are inviolate; his

contracts cannot be reconstructed retroactively. Although the complainant also calls into question the WHO's treatment of all short-term staff, his pleas are of a general nature and lie outside the scope of an individual complaint to the Tribunal.

Unlike fixed-term staff members the complainant was recruited without having to participate in a competitive selection procedure. Much of the complainant's work was project-specific. Asking to be regarded as a fixed-term official is equivalent to asking to be appointed to a post. According to the case law, the Tribunal recognises an organisation's freedom to determine its own requirements and the discretionary nature of the decisions it takes. There is no basis for the claim that the WHO was in breach of the principle of equal pay for work of equal value, and the concept of unjust enrichment is not applicable to the facts at hand.

The Staff Rules do not stipulate that the holder of a short-term contract has to be given advance notice of non-renewal; the complainant did nonetheless receive reasonable notice. The memorandum of 16 April confirmed what he had been told in earlier meetings, and the reasons given to him by his supervisor were accurate. His request for reinstatement is unsustainable; although the WHO was not obliged to do so, it offered him a contract in the Department of Assessment, Classification and Epidemiology (ACE) but he chose not to accept it. There is no evidence to support his allegation that his supervisor obstructed his efforts to find work outside the WHO; his allegations are speculative and there is no basis for his claim to an *ex gratia* payment. Furthermore, the "note for the record" that the complainant refers to was withdrawn from the files in July 1999.

D. In his rejoinder the complainant points out that in his letter to the Director-General of 21 July 2000 he said he was awaiting the outcome of the investigation into the issue of harassment and hoped he would be notified of it in all due haste. He interprets the Working Group's failure to report on the investigation as a constructive denial of his request for relief, and argues that it renders his claim of harassment receivable. As at the date of filing his rejoinder the findings of the Working Group

"remained pending", his injuries remained unredressed and the delay was encroaching on his ability to present his case fully to the Tribunal.

He states that in asserting his right to be a fixed-term staff member he was not trying to evade the Organization's formal selection process. His entitlement to reinstatement is, he contends, undeniably sustainable. It was reasonable for him to refuse the offer of employment in the ACE Department: it was a verbal offer "made late in the afternoon" on his final day of work. He had met with the Team Leader of ACE a week previously and was told that future work in the Department was uncertain and could be outside his field of expertise.

E. With its surrejoinder the Organization produces the text of a statement written by the Team Leader of ACE indicating that discussions had been under way since May 1999 with a view to the complainant taking up employment for four months in that Department. The WHO says that the complainant only rejected the offer on 16 July 1999 and concludes that he therefore freely decided to leave the Organization's employ.

It says that the Director-General wants to reach a final decision on the harassment issue as expeditiously as possible, but first wishes to obtain the report from the Grievance Panel investigating the other harassment case (referred to under A above).

CONSIDERATIONS

1. The complainant was employed by the WHO from 17 October 1994 on successive short-term contracts in the Programme on Substance Abuse, which in December 1998 became the Substance Abuse Department (SAB). From 17 January 1999 he held a short-term contract that was due to expire on 16 July 1999. The Director of the SAB, his first-level supervisor, informed him in a memorandum of 16 April 1999 that she would not be in a position to renew his contract. This information was confirmed by another memorandum dated 5 July 1999.

2. Shortly before the end of his contract, the complainant was offered a short-term appointment until November 1999 in a different department. He refused the offer and stated his reasons for doing so;

namely, that the offer had been made too late, that it was for too short a period, that there had been no formal confirmation and he had already made other arrangements.

3. The complainant appealed to the Headquarters Board of Appeal against the non-renewal of his contract. He took issue with his status as a short-term staff member and the status of short-term staff in general, principally arguing that:

- (i) he should be considered as a fixed-term staff member; and
- (ii) his contract should have been renewed.

The Board refused to take up the complainant's arguments relating to the status of short-term staff in general on the grounds that its role was to examine appeals brought by staff against specific administrative decisions affecting their employment status and to ensure that these decisions were in accordance with the WHO Staff Rules and Regulations. It considered that it was "not a proper vehicle for seeking to change the existing rules or the policy of the Organization".

4. The complainant claimed that the refusal to renew his contract was tainted by the prejudice and malice of his supervisor and that he had been the victim of unfair treatment and discrimination and had been subjected to psychological harassment. He also claimed that the notice he was given was "vague and inadequate".

5. In its report of 20 March 2000 the Board recommended that the Organization should carry out a full investigation into the allegations of harassment and mobbing and take further action upon completion of the investigation. It recommended that the decision not to renew the complainant's contract should stand. Noting that his final contract had been for a period of six months, it recommended paying him a sum equivalent to six months' salary, as compensation for the lack of reasonable and adequate notice and the ensuing stress. It also recommended paying him a sum for costs.

6. The Director-General, by a letter dated 20 June 2000, informed the complainant that she had decided to ask the Working Group on Harassment to review his allegations of harassment, and provide her with a report on the matter and a recommendation. She concurred with the recommendation that the decision not to renew the complainant's contract should stand. She did not accept that he was entitled to notice: by the terms of his contract, none was required. In any event he was given prior notification and was offered a new contract, but had declined the offer. For these reasons she did not endorse the recommendation to pay him the equivalent of six months' salary. That is the decision impugned.

7. The complainant puts forward six pleas:

- His first is that the Organization infringed its own policy aimed at protecting staff from psychological harassment, particularly by managers or supervisors, and he cites instances.
- Secondly, he argues that the Organization's practice of maintaining long-serving staff on short-term contracts is illegal and he is entitled to be treated as a staff member on a fixed-term contract.
- Thirdly, the decision not to renew his contract was tainted by the prejudice and malice of his supervisor.
- Fourthly, the Organization failed to give him adequate notice and did not give clearly stated reasons for its decision not to renew his contract; therefore, it could be deemed renewed by implication.
- Fifthly, the Organization caused him severe moral injury as a result of the "defamatory" nature of the "note for the record" dated 9 April 1999.
- His sixth plea concerns the failure of the Organization to allow the Ombudsperson, the Joint Medical Service physician and the then Executive Director of Administration to give evidence in the proceedings before the Headquarters Board of Appeal. All three requested that they be excused on the grounds of confidentiality, and the Board, with the assent of the Administration, did not accede to his request to have these witnesses testify. He was thus denied due process.

8. As for the allegations of harassment the Organization argues that the Director-General has not yet taken a final decision thereon and that therefore the complainant's claim of harassment is irreceivable.

9. The Tribunal holds that since only final decisions can be challenged before the Tribunal, the absence of a final decision on the harassment claim renders it irreceivable. The matter was referred to the Working Group on Harassment. When the group has completed its work the Director-General will be in a position to give a final decision which would be appealable to the Tribunal.

10. The complainant's claim that he should be considered as a fixed-term staff member cannot be sustained. The complainant was recruited as a short-term staff member, without having to go through a competition process; he accepted several contract renewals. It was within the discretionary authority of the Director-General to decide during the years that the complainant was with the Organization whether to renew each short-term contract or offer him a fixed-term contract. There is no basis on which the complainant can claim to be treated retroactively as if he had a fixed-term contract. He was at all times a short-term staff member.

11. Concerning the complainant's claim that he received inadequate notice, the Tribunal is satisfied that the memorandum of 16 April 1999 did give him notice. The complainant's supervisor wrote:

"... we have extremely limited monies available with which we can pay staff salaries. As the priorities of the Department are evolving in ways that require qualifications which you do not presently have, it appears at this time that I will not be in a position to renew your [short-term professional] contract in July 1999 when your current contract expires. I regret this situation but feel that I must take the steps that are necessary to ensure the continued viability of the Substance Abuse Department".

The complainant was given more than three months' notice that his contract would not be renewed. In the opinion of the Tribunal, that constituted adequate notice.

12. The memorandum of 16 April gave specific reasons which were repeated in the memorandum of 5 July 1999 so the complainant cannot

succeed on the ground that the decision is unreasoned. Moreover, the availability of funding and the relevance of the complainant's qualifications to the future needs of the department are matters properly within the appreciation of management.

This finding is without prejudice to the complainant's right to argue in the harassment inquiry that the actual reason for non-renewal was due to harassment.

13. The claim relating to the note for the record of 9 April 1999 was not put forward in the internal appeal and is irreceivable on that ground; the note was in fact removed from the files on 2 July 1999.

14. The plea concerning the non-attendance of witnesses whom the complainant contends could have proven the harassment allegation, is not relevant to this complaint as the part of the complaint related to harassment is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet
CATHERINE COMTET

NINETY-SECOND SESSION

In re von Keitz

Judgment No. 2108

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Saideh von Keitz against the World Health Organization (WHO) on 29 September 2000 and corrected on 15 January 2001, the WHO's reply of 11 April, the complainant's rejoinder of 12 July, and the Organization's surrejoinder of 27 September 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1957 and is of German nationality. She joined the WHO in February 1997 as a short-term professional at grade P.5, and worked as a system analyst at the WHO's Centre for Health Development, in Kobe, Japan. In April 1997 she was transferred to a P.4 post, retaining her P.5 grade on a personal basis. She was granted a two-year fixed-term contract due to expire on 14 May 1999.

Between 19 November 1998 and 12 February 1999 the complainant was away from Kobe on home leave that merged into certified sick leave from mid-December onwards. The Director of the Centre retired at the end

of 1998, and a new Director officially took up his functions on 1 January 1999 thus becoming the complainant's first-level supervisor.

In a letter of 12 May 1999 a Personnel Officer in WHO headquarters informed the complainant that although, because of her leave a full assessment of her performance had not been possible, the new Director had concerns about her performance and thought it did not warrant a two-year extension; it had therefore been decided to grant her only a one-year extension. On 24 May 1999 she signed the contract extension form filled out by her supervisor on 26 February. On 27 May 1999 she received her completed appraisal for the period from 1 May 1998 to 30 April 1999, in which she was assessed by both the former Director of the Centre as well as by his successor.

By a statement dated 9 July 1999 the complainant notified her intention to appeal against the appraisal report and the one-year contract extension. In her appeal she alleged psychological harassment on the part of her new first-level supervisor. On 26 July 1999 she was temporarily assigned to the WHO's Regional Office for the Eastern Mediterranean (EMRO) in Alexandria, Egypt. After nine months at EMRO her contract was extended by another three months. She was then transferred to WHO headquarters with effect from 1 September 2000.

The Headquarters Board of Appeal reported on her case on 10 April 2000. It recommended that the challenged appraisal report should be maintained and the decision to grant her a contract for only one year be allowed to stand; it thought, however, that she should be granted 20,000 Swiss francs in moral damages. It also recommended that an investigation be carried out into her allegations of harassment. In a letter of 27 June 2000, the impugned decision, the Director-General did not agree to awarding the complainant moral damages, but adopted the Board's recommendation regarding the appraisal report and the length of contract. Moreover, she said that the harassment issue was to be referred to the Chairperson of the Working Group on Harassment who would arrange for the complainant's case to be examined, and for a report and recommendation to be provided.

B. The complainant submits that the grounds for her complaint are the Organization's failure to observe the Staff Rules and Staff Regulations, incomplete consideration of the facts and prejudice on the part of responsible officials.

She has five pleas. First, she claims that while under the supervision of the new Director in Kobe she was the victim of psychological harassment and sexual discrimination. Upon her return from sick leave on 15 February 1999, she was improperly denied work assignments. Computer passwords were "stripped away" from her, as were her work projects. Her supervisor took the decision to reduce her contract after supervising her for only nine working days. The psychological harassment inflicted on her by her supervisor and others constituted serious moral injury.

Secondly, she submits that despite being informed of the problems, the WHO allowed the harmful work environment to persist and did not take appropriate action. Furthermore, the investigation into her harassment claim, announced in the impugned decision, has not yet taken place.

Thirdly, she states that, as a result of her new supervisor's actions, she was wrongfully denied a two-year extension of her contract. The decision to limit her contract to one year was, moreover, put into effect before her challenged performance appraisal was completed. The appraisal itself had no basis in law or in fact: it was "false and erroneous".

Fourthly, she submits that she was not notified of her one-year extension until after her previous contract had expired. The Organization did not give her sufficient warning of her change in status: indeed, under Staff Rule 1040, she should have received three month's notice. The lack of notice constituted a procedural error and caused her contract to be renewed, by implication, for a further two-year term.

Fifthly, she avers that it is a long-established practice for the WHO to grant a two-year extension upon the expiry of an initial two-year contract, and that practice should have held good in her case.

The complainant seeks: the withdrawal of her 1998-99 appraisal report and its replacement by an objective appraisal; the setting aside of the impugned decision and the extension of her present contract for an additional two-year term; an investigation into the actions of her first-level

supervisor and, if justified, disciplinary actions against him; apologies from both her first and second-level supervisors; her transfer to a regular budget post at headquarters with retroactive effect from 14 May 1999; an award for "out of pocket losses" as a result of her "forced and illegal removal from Kobe"; costs; interest on any sums awarded; 100,000 Swiss francs in compensation for moral and "personal" injuries; and any other relief deemed necessary by the Tribunal.

Lastly, she wants the Organization to produce all documents or correspondence that would in any way shed further light on the subject matter of her grievances.

C. In its reply the Organization points out that delays have occurred in initiating the investigation decided upon by the Director-General. As the Director-General has not yet taken a final decision on the harassment allegations, the complainant shows no cause of action and the claims arising therefrom are irreceivable. In cluster note 2001/9 of 23 March 2001 it informed staff of its policy on harassment established by the Working Group on Harassment. It made known therein that it intended putting in place a Grievance Panel to take up harassment cases.

On the merits the WHO contests the accuracy of some of the statements made by the complainant. It rejects the complainant's allegation that it took no early action on the harassment issue; her change of duty station came about as a result of steps taken while she was still in Kobe.

The decision to extend the complainant's contract for one year instead of two was a proper exercise of its discretionary authority. There were concerns about her performance and a longer extension would have run contrary to the Organization's interest. By at least allowing her an extension, it gave the complainant the opportunity to improve her performance. The rules do not provide for an automatic right to the renewal of a contract, nor to an extension of a particular duration. The three-month notice period mentioned in Staff Rule 1040 applies only in the event of non-renewal, which is not the case here. The complainant received the written notification about her reduced contract on 14 May 1999, the day her contract expired. It was faxed to her in Kobe.

The decision to limit the duration of her contract was not based on her new first-level supervisor's evaluation alone; comments of the previous Director were also taken into account. The assessment made by the new Director covered the period from 15 February to 29 April 1999 and was therefore not based, as implied by the complainant, on a nine-day period. Contrary to her assertions, there was a factual basis to the decision.

The Organization points out that although the complainant asks for disciplinary measures to be taken, such remedies do not fall within the competence of the Tribunal. It rejects her claims to financial compensation as being without merit: she had no wish to stay in Kobe. It sees no reason to produce further correspondence and documentation, being of the opinion that the extensive submissions already put forward should suffice.

D. In her rejoinder the complainant refers to a letter sent by her counsel to the Director-General on 16 July 1999 asking for an investigation to be conducted into the harassment issue. As no definitive answer was received from the Organization within three months she concludes that her request was denied and her claims regarding harassment are therefore receivable.

She contests some aspects of the Organization's rendering of the facts. She argues that she was victimised twice – firstly by officials in Kobe and secondly by others at high level in headquarters. Such treatment has caused her even further moral injury. She contends that it was not poor performance which led to the truncating of her contract, but the prejudice and bias of her supervisor and others. She says that the Organization has produced nothing in its reply to show that the new Director assigned any work to her.

E. In its surrejoinder the Organization presses its pleas and states that the investigation into the harassment issue is under way. It has appointed a Grievance Panel which has begun its work. It was due to hold its first meeting in October 2001. The Panel's task was rendered more complex because the complainant filed a second complaint of harassment against another official, and it is considering both cases at the same time.

The WHO takes the view that the complainant, in spite of her assertions to the contrary, did have work in Kobe. She had a post description with terms of reference set in March 1997.

CONSIDERATIONS

1. The complainant joined the WHO in February 1997 at grade P.5, in the Centre for Health Development in Kobe, Japan. In April 1997 she was appointed to a P.4 post, keeping grade P.5 on a personal basis, and was given a two-year fixed-term contract due to expire on 14 May 1999.
2. She was absent from 19 November 1998 to 12 February 1999 on home leave that merged into certified sick leave. The Director of the Centre, Dr W., retired at the end of December 1998 and was replaced by Dr K., who took over from him as the complainant's first-level supervisor. On 12 April the complainant received her performance evaluation form from Dr K., for her to complete. She returned the form the next day, completed as requested, with an attachment listing activities undertaken during the reporting period. On 28 April Dr K. informed her that Dr W. would appraise her performance from 1 May to 31 December 1998 and he himself would cover the period from 1 January to 30 April 1999.
3. By a letter of 12 May the complainant was informed by a Personnel Officer that her contract would be renewed for one year only. Dr K. had concerns about the complainant's performance and the one-year extension would allow time for a full assessment to take place.
4. On 27 May 1999 the complainant received her annual appraisal completed by Dr W. and Dr K., both of whom made negative comments.
5. In an appeal lodged with the Headquarters Board of Appeal the complainant contested her appraisal report and the fact that her contract was renewed for one year instead of two. She contended that it was extended by implication for two years due to the Organization's failure to give her adequate notice. She alleged prejudice by her new supervisor in his evaluation of her performance and said that the Organization had failed to take steps to protect her from his misconduct and the psychological harassment she suffered.

6. The Headquarters Board of Appeal reported on 10 April 2000. It expressed dismay at the length of the pleadings submitted by the complainant's counsel and the repetitive style adopted therein; they were not presented in a "succinct and readily understandable manner". The Tribunal can only endorse the Board's remarks.

7. The Board considered it plausible that the complainant's performance had indeed deteriorated since her previous appraisal and that her former supervisor, Dr W., had legitimately changed his opinion of her work. It found the appraisal had been completed in accordance with Staff Rule 530.2 and WHO Manual paragraph II.5.50 which require supervisors to draw up performance evaluations. The Board considered that it was reasonable for the Organization to extend the complainant's contract for one year in the light of the doubts expressed by Dr W. regarding her performance; it allowed her time to improve. It noted that under the Staff Rules three months' notice is required in the event of termination of a fixed-term contract of more than one year; the Rules, however, do not stipulate that notice is required when a contract is extended.

8. The Board concluded that the appraisal report for May 1998 to April 1999 was valid. The doubts expressed by Dr W. were sufficient to justify an extension of contract for only one year. Even if the complainant was notified of the one-year extension after her contract had expired, under the Staff Rules and Regulations that cannot result in the automatic renewal of her contract for a two-year period.

It further concluded that during the period from February to August 1999 while she was still in Kobe, the complainant's work situation was not clearly explained to her. She suffered as a result of poor management practice and this required compensation.

9. The Board said that the complainant had documented a situation that could constitute harassment if proven and concluded that a full investigation should be carried out.

10. The Board recommended that the contested appraisal report be maintained and the decision to renew her contract for one year be allowed

to stand. It also recommended that an immediate investigation be carried out into the allegations of harassment and that further action be taken as appropriate. It recommended paying her a sum of 20,000 Swiss francs as compensation for moral injury and a sum for legal expenses.

11. The Director-General, by a letter of 27 June 2000, accepted the Board's recommendation to hold an investigation and said that she had asked the Working Group on Harassment to examine the complainant's allegations and provide her with a report, including a recommendation. She accepted the Board's conclusion that the appraisal report was valid, having been completed in accordance with the Staff Rules and Regulations, and agreed with its recommendation that the report should be maintained. She also accepted the Board's recommendation that the extension of contract for one year be allowed to stand. However, she did not concur with the recommendation to pay the complainant moral damages and deferred the decision on the payment of legal costs pending the outcome of the harassment examination. That is the decision impugned.

12. The Organization raises the question of receivability in relation to the allegation of harassment, since pending the outcome of the investigation no final decision has yet been taken.

13. Only final decisions are appealable to the Tribunal, therefore the aspects of this complaint which relate to allegations of harassment are irreceivable and must await a final decision.

14. This leaves only the issue of the validity of the appraisal report and the renewal of the complainant's contract for a period of one year only.

15. The appraisal report was carried out in accordance with the Staff Rules and Regulations. The complainant's first-level supervisor, Dr W., who covered the period from 1 May to 31 December 1998 acknowledged that his appraisal of her work after her first year was very positive. However, he also mentioned several negative aspects which became manifest after she received her fixed-term appointment, and cited examples. He said he was not intending to extend her contract.

16. Dr K. dealt with the period from 1 January to 30 April 1999. The complainant had been at work only from 15 February to 29 April 1999. He commented that her performance had been disappointing. He concluded that it would be in the interests of the Organization to extend her contract for one year only, in order for him to evaluate her performance during that period.

17. The complainant had the opportunity to comment on both these evaluations in accordance with the Staff Rules.

18. In evaluating the performance of staff members, the Tribunal has always taken the view that supervisors should be able to express their views openly and honestly subject to the official concerned being able to comment. The Tribunal finds that the assessment was carried out in accordance with the Staff Rules and Regulations and there is no reason to set aside the assessment. This is without prejudice to the complainant's right to prove the existence of harassment influencing the assessment.

19. In taking the decision to renew the complainant's contract for one year only, the Organization acted within its rights and properly exercised discretionary authority. The renewal for one year was in the best interest of the Organization. It also allowed the complainant time to show an improvement in her performance. Nothing in the rules stipulates that notice has to be given when a contract is renewed.

20. The other claims of the complainant are either dependent on the outcome of the harassment investigation or are irreceivable because they did not form part of the internal appeal.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Hoornaert (No. 3)

Judgment No. 2109

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Winfried Hoornaert against the European Patent Organisation (EPO) on 19 February 2001 and corrected on 5 March, the EPO's reply of 23 May, the complainant's rejoinder of 6 August, and the Organisation's surrejoinder of 1 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to the complainant's career are set out under A in Judgment 722 on his second complaint. He is currently an examiner at grade A4/2. On 19 December 1989 the complainant became ill; he resumed work at 80 per cent a few months later. He had a relapse in 1998, and on 30 September of that year, he had reached the maximum amount of paid sick leave allowed under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office. Thereafter, he was able to resume work on a 50 per cent basis. The relevant paragraphs of Article 62 are as follows:

"(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a

permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary.

(8) The Invalidity Committee may decide that a permanent employee on extended sick leave must resume his duties, but subject to a reduction in his working hours. As from the date on which he resumes his duties, the permanent employee shall again be entitled to advancement to a higher step and to annual and home leave. In so far as he did not receive the whole of his basic salary under the provisions of paragraph 7, he shall receive a proportion, equal to the fraction of the normal hours actually worked, of the basic salary appropriate to his grade and step, and a proportion, equal to that fraction of the normal working hours for which he is authorised not to work, of the salary he received in accordance with paragraph 7."

On 4 November 1998 the complainant was informed, by a note from the Personnel Department, that as he had reached the maximum amount of paid sick leave allowed under Article 62(6), paragraph 7 of the same article now applied to him. Accordingly, under Article 89 of the Service Regulations, a medical practitioner had been appointed to represent the Office on the Invalidity Committee and the complainant was invited to appoint a medical practitioner of his choice to that Committee. He was also informed that since he had worked only 50 per cent from 5 October 1998, his annual and home leave would be reduced proportionally to his working hours, but his salary would provisionally be paid in full until a decision on his incapacity to work had been taken.

On 23 November the complainant wrote to the Personnel Department contesting the reduction in his annual leave and asking on what basis this had been done. The Director of Personnel Development replied on 23 December 1998 that, because of the holiday period, the examination of this question would take more time than usual. By a letter dated 1 February 1999 the complainant asked the President of the Office "to undo the

reduction of leave" or, if he could not, to consider the letter as introducing an internal appeal.

The Director of Personnel Development responded to the complainant on 22 February stating that, as the wording of Article 62(8) "does not detail the calculation of annual and home leave[,] the provision needs interpretation". He went on to say that a distinction is made in Article 62 between "paid sick leave" and "extended sick leave": under paid sick leave the staff member retains his entitlements in full, whereas under extended sick leave entitlements are reduced. A staff member on extended sick leave who is able to resume duties subject to a reduction of working hours receives his entitlements in full again but only proportionate to his working time: any other, more generous, interpretation would imply an unjustified privilege compared to staff members on extended sick leave who are not in a position to resume their duties on a part-time basis. The Director concluded by stating that the complainant's letter of 1 February was being treated as an internal appeal, but that he hoped the complainant would reconsider it in the light of his explanations. On 9 March 1999, the complainant pressed his appeal, claiming a breach of Circular No. 22, Rule 2 (b) iii).

In August 1999 the Invalidity Committee determined that the complainant suffered a serious illness within the meaning of Article 62(7) and set his working hours at 50 per cent.

In its opinion of 8 December 2000 the Appeals Committee unanimously recommended rejecting the appeal as unfounded. On 20 December 2000 the Director of Personnel Development informed the complainant that the President had rejected the appeal. That is the impugned decision.

B. The complainant contends that Article 62(7) concerns permanent employees "totally" unable to perform their duties and for that reason entitlement to half salary is provided therein, whereas paragraph 8 defines "other remuneration" for employees resuming their duties subject to a reduction in working hours. He concludes that in order to have paragraphs 7 and 8 in line with one another, "full" sick leave is meant in paragraph 7; but as he was able to work 50 per cent after reaching the maximum amount of

sick leave under paragraph 6 he claims that he never lost his rights to advancement, annual or home leave. He asserts that since the entitlement to advancement had not been affected, full leave rights should also be granted; to interpret paragraphs 7 and 8 any differently would not respect the legislator's intent.

He submits that the contested decision leads to discrimination between sick employees: those who do not reach the limit under Article 62(6) continue to accrue full annual and home leave, but those who have reached the limit get only a portion. The complainant argues that sick leave should not be used as a replacement for, or to complement, home leave. He states that the Appeals Committee made a comparison between extended sick leave and unpaid leave, but in his view these are not comparable: unpaid leave is normally asked for by the employee, whereas extended sick leave is imposed on the employee by doctors.

This difference is reflected in Circular No. 22, Rule 2 (b) iii) which takes into account any period of sick leave in the calculation of leave entitlement, whereas unpaid leave "gives no entitlement". He contends that the President of the Office has breached his obligation to respect the intent of the legislators and he has therefore drawn wrong conclusions from the facts surrounding his case.

He asks the Tribunal to quash the President's decision of 20 December 2000 and to grant him full annual and home leave in accordance with Article 59(1) of the Service Regulations, and to order that he be paid compensation in the amount of 20 per cent of his monthly remuneration, including allowances, for each day of leave that has been "illegally withheld". He also claims interest and 2,500 euros in costs.

C. The EPO replies that a staff member on extended sick leave who returns to work on reduced hours receives full entitlements in proportion to his working time.

It points out that Article 59(1), to which the complainant refers in his claims, concerns only the entitlement to annual leave and does not concern staff on sick leave. The complainant's entitlements are governed by Article 62 because he has been on extended sick leave. Although he is authorised to work only 50 per cent he receives a full salary because his

illness has been recognised as serious. Article 62 makes a distinction between "paid sick leave" and "extended sick leave" and specifies different entitlements for each. However, as regards annual and home leave entitlements, the Administration has interpreted Article 62, paragraphs 6 to 8, by deciding that:

"- a staff member on "paid" sick leave retains full entitlement to annual and home leave;

- a staff member on "extended" sick leave loses entitlement to annual and home leave, unless he returns to work at reduced working hours - in which case entitlement is restored in a proportion equal to that fraction of normal working hours for which he is authorised to work."

Article 62(8) which provides that a staff member on extended sick leave who returns to work at reduced working hours "shall again be entitled to ... annual and home leave" is an exception to Article 62(7) but it does not specify the precise extent to which that entitlement is restored.

Article 56, which relates to part-time employment, expresses the principle that the annual leave of a part-time permanent employee is reduced in proportion to the working time authorised. The complainant being authorised to work part-time, his annual leave entitlement is calculated in the manner set out in Article 56. Similarly, paragraph 3 of Circular No. 34, Rev. 1, applies to the calculation of home leave for part-time employees. Circular No. 22, Rule 2 (b) iii), therefore, cannot be interpreted as the complainant would wish. Since Article 62(7) expressly excludes entitlement to annual leave in cases of extended sick leave, the words "any period of sick leave" in Rule 2 (b) iii) can only refer to the paid sick leave for which a staff member retains his entitlement to annual leave. The EPO points out that the Appeals Committee did not compare staff on extended sick leave with those on unpaid leave, but rather with those working part-time.

It submits that the claim to 20 per cent of monthly pay in compensation for injury suffered is excessive.

D. In his rejoinder the complainant clarifies his claims in response to the EPO's comments. He submits that Article 59(1) does apply to staff members on sick leave. He argues that paragraphs 7 and 8 are alternatives and that it is a mistake to treat paragraph 8 as an exception to paragraph 7. In his view, the latter paragraph deals with staff fully unable to work, whereas paragraph 8 deals with staff able to work part of the time.

He reiterates that part-time work involves "free choice" whereas sick leave is imposed on the staff member by doctors. There are, therefore, good reasons to treat them differently and the legislator did just that. He submits that one should consider that half of his leave time is "spoiled" by his sickness.

E. In its surrejoinder the Organisation reiterates that Article 59(1) does not apply to the complainant. It concerns the entitlement to annual leave of staff working 100 per cent of the normal working hours; the complainant is on extended sick leave, therefore it is Article 62 which applies in his case. The complainant's interpretation – that Article 62, paragraphs 7 and 8 are mutually exclusive – is not sound, nor are his arguments concerning Circular No. 22, Rule 2 (b) iii).

The correct method for calculating annual leave for staff authorised to work part-time is to be found in Article 56(5). It is not relevant why someone works part-time, but merely the fact that he does so. The EPO contends that the complainant's assertion that he is deprived of half of his leave due to his illness is not correct; he suffers no hardship as regards the free time available to him for annual and home leave. The complainant has no entitlement to annual and home leave for the 50 per cent of the normal working hours during which he is on extended sick leave. Hence, he is only entitled to a fraction of the statutory annual and home leave, regardless of the fact that he receives full remuneration.

CONSIDERATIONS

1. The complainant is an examiner at grade A4/2 at the European Patent Office, the secretariat of the EPO. After several absences due to illness he was informed by a note from the Personnel Department of 4 November 1998 that by 30 September 1998 he had used up his entitlement to paid sick leave of twelve months over a period of three years. The Invalidity Committee was therefore to be convened pursuant to Article 89 of the Service Regulations. Furthermore, since he had started to work half time as from 5 October 1998, his annual leave and home leave would be reduced in proportion to his working hours.

On 23 November the complainant protested, deeming the reduction in leave to be in breach of his rights. The Administration replied on 23 December 1998 that there would be some delay in examining his case owing to the holiday period, but that the time limit for filing an internal appeal would not start to run until he received the decision responding to his objection. On 1 February 1999 the complainant filed an internal appeal. On 22 February the Director of Personnel Development explained to him how Article 62 was to be construed: leave entitlements are retained in full in the event of paid sick leave, but not where a staff member on extended sick leave returns to work part time. On 9 March 1999 the complainant pressed his appeal. The Appeals Committee unanimously recommended rejecting the appeal, and the President of the Office endorsed the recommendation on 20 December 2000.

The complainant has come to the Tribunal seeking the quashing of that decision. He also seeks compensation for each day of leave "illegally withheld", plus interest and costs.

2. This dispute brings to light the fact that the Service Regulations make no specific provision for the complainant's case. The EPO itself admits to a gap in the material rules, which therefore need interpretation. It is worth recalling the relevant provisions before taking up the complainant's pleas.

3. Article 56(5) of the Service Regulations says that the "annual leave of a permanent employee who is authorised to work part-time shall be curtailed in proportion".

4. Article 59(1), which in his statement of claims the complainant asks to benefit from, provides in general that "employees shall be entitled to annual leave of thirty working days per calendar year".

5. Sick leave is governed by Article 62 of the Service Regulations. Under Article 62(6), an employee on sick leave retains full rights to his basic salary and to advancement provided that the leave has not exceeded twelve months either in one unbroken period or in several periods within three consecutive years. Under Article 62(7), which deals with extended

sick leave, an employee who exceeds the maximum period of twelve months ceases to be entitled to advancement, annual leave and home leave, and is entitled to half the basic salary received at the expiry of those twelve months. The last sentence of 62(7) provides, however, that the employee is entitled to the whole of the basic salary if the incapacity for work is the result of an accident or a serious illness – as in the complainant's case.

Article 62(8), which covers extended sick leave where the Invalidity Committee allows the employee to resume duties part-time, says that in such cases the employee recovers the entitlement to advancement to a higher step and to annual leave and home leave. It also says:

"In so far as [the employee] did not receive the whole of his basic salary under the provisions of paragraph 7, he shall receive a proportion, equal to the fraction of the normal hours actually worked, of the basic salary appropriate to his grade and step, and a proportion, equal to that fraction of the normal working hours for which he is authorised not to work, of the salary he received in accordance with paragraph 7."

6. Two circulars should also be mentioned. Circular No. 22, cited by the complainant, states under Rule 2(b) iii) that leave entitlement will accrue on the basis of the total length of service completed, including any period of sick leave or annual leave or home leave. According to Circular No. 34, Rev. 1, for the purpose of calculating seniority for advancement in step or promotion, part-time work is counted as full-time. The circular also provides that the period of home leave will be correspondingly reduced. But it does not appear to cover the case of someone who works part time for medical reasons.

7. The conclusion is that the material rules do not specify the leave entitlements of someone who is on extended sick leave and authorised to work part time, so the Administration had to resort to interpretation, as it itself admits.

8. The Appeals Committee based its recommendation, which the President endorsed, on its finding that the provisions offer no alternative but to apply the same principle, set in Article 56(5), that the annual leave of staff authorised to work part-time is curtailed in proportion.

9. That, retorts the complainant, makes for inconsistency because entitlements to advancement and leave entitlements are treated differently: the former are maintained while the latter are restricted. It also leads to discrimination between employees who have taken less than twelve months' sick leave and those who may be more seriously ill and have exceeded the limit. In his view the Administration has obviously misunderstood the legislator's intent. Part-time work is a choice whereas sick leave is imposed by a doctor and one's state of health, so it stands to reason that the legislator would treat them differently.

10. As the Appeals Committee noted and the Administration conceded, there is a gap in the law. Nevertheless, the rule to be applied is the one set in Article 56(5) of the Service Regulations. It is general in scope and is in keeping with the Tribunal's finding in Judgment 1985 (*in re Vézina*) that leave entitlements are ordinarily granted for service completed. There being no express provision for an employee on extended sick leave authorised to work part time while retaining entitlement to full pay, the rule to resort to is Article 56, on part-time work. Its application will not result in discrimination since an official on extended sick leave and one on paid sick leave are not in like case. Nor will there be disregard of the legislator's intent, which was that the rule set in Article 56 should be a general one.

11. The complainant's claim to the quashing of the decision must be therefore dismissed and so too must his claims to compensation.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* De Lucia (No. 4)
and Rosé (No. 5)**

Judgment No. 2110

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Gennaro De Lucia against the European Patent Organisation (EPO) on 12 December 2000 and corrected on 22 January 2001, the fifth complaint filed by Mr Alain René Pierre Rosé against the EPO on 11 December 2000 and corrected on 2 February 2001, the EPO's single reply of 4 May, the complainants' rejoinder of 25 July and the Organisation's surrejoinder of 1 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Mr Rosé, a Frenchman who was born in 1960, joined the European Patent Office, the EPO's secretariat, on 1 November 1984. He serves at Directorate-General 1 in The Hague as a search examiner at grade A3. Mr De Lucia, an Italian who was born in 1961, joined the staff of the Office on 1 November 1986. He is a formalities officer at grade B3 at Directorate-General 2 in Munich.

By decision CA/D 7/83 the EPO's Administrative Council amended as from 10 June 1983 Article 84 of the Service Regulations headed "Death or

permanent invalidity". It was decided in 1989 that the old version of Article 84 would apply to staff recruited prior to 10 June 1983. For staff members who joined the Organisation from that date – the only ones concerned by this dispute – the article as amended prescribes that:

"(2) ...

- b) if the Invalidity Committee establishes that the permanent invalidity has occurred on or after the date at which the permanent employee attained the age of 56, the lump sum [payable] shall be reduced by:
 - 20% at the age of 56
 - 40% at the age of 57
 - 60% at the age of 58
 - 80% at the age of 59
 - 100% at the age of 60.

...

- (4) One third of the contribution, calculated by reference to the basic salary of the permanent employee, which is required to meet the insurance of the risks [of death and permanent invalidity] shall be charged to the employee, but so that the amount charged to him shall not exceed 0.6% of his basic salary."

When the Office was set up in 1977, the Organisation concluded a collective insurance contract with a European group of insurance companies to cover sickness, death and permanent invalidity; it is administered by the broker Van Breda. By decision CA/D 9/97 of 5 December 1997 the Council approved a draft of an endorsement, No. 26, to the collective insurance contract under which the fixed term of the contract would be reduced from five to three years as from 1 January 1998.

On 19 September 1997 Van Breda informed the Organisation that the insurers wanted to review premiums. They wanted to review those for permanent invalidity insurance because the number of invalidity cases had increased significantly between 1993 and 1996. The matter was put to the General Advisory Committee at its 122nd meeting, on 10 November 1997. By a note of 21 January 1998 the latter's Chairman told the President of the Office that the Committee members he had appointed had been in favour of increasing premiums but that those appointed by the Staff Committee had not been in a position to give an opinion. Circular No. 247 of 23 January 1998 set out the new rates of the contribution payable by staff for permanent invalidity insurance. For staff recruited prior to 10 June 1983 the rate was maintained at 0.457 per cent of basic salary – any increase would have

meant exceeding the 0.6 per cent ceiling established by Article 84(4) of the Service Regulations. For the others, however, it was raised by 290 per cent to 0.1936 per cent of basic salary for permanent employees.

On 17 and 21 April 1999 several officials, including the complainants, challenged the decision constituted by their pay slips for January 1998 applying Circular No. 247 to them individually. They asked the President to quash the increase in the rate of contribution for permanent invalidity insurance, to adjust their pay with retroactive effect from 1 January 1998 on the basis of the rate in force at 31 December 1997 and to repay the amounts wrongfully withheld from their salary. The *Gazette* of 15 June 1998 informed staff that the President had decided not to allow their appeals and had referred them to the Appeals Committee, which registered them under the reference RL/37/98. The Committee reported on 6 July 2000. Its recommendation was to allow the appeals and quash the increase in contribution rates set in Circular No. 247, and to reimburse the overpayments plus interest at the rate of 10 per cent a year. By letters of 7 September 2000 the President informed the appellants individually that their appeals had been dismissed. Those are the impugned decisions

B. The complainants' first plea is breach of Article 84(4) of the Service Regulations. The EPO denied them information enabling them to ascertain that an increase of 290 per cent in the rate of contribution for permanent invalidity insurance was warranted. That, they say, amounts to an "admission" that the rate was abnormally high, and by imposing it on staff who had already been penalised by the lower coverage introduced by the amendment to Article 84, the Organisation failed in its duty of care.

They further plead breach of Article 38(3) of the Service Regulations which lists the subjects on which the General Advisory Committee is to be consulted. They include "any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff". The complainants observe that the draft of endorsement 26 was not put to the Committee even though there was no obvious urgency warranting a waiver of consultation. Consequently, Circular No. 247 is unlawful because it was adopted in the context of applying a contract when at least one of the endorsements had not been seen

by the Committee. And although the latter was consulted about the increase in the rate of contribution, the procedure was tainted by bad faith because the Administration did not of its own accord forward all the information the Committee needed to ascertain whether the increase was necessary.

Lastly, they plead breach of Article 106(1) of the Service Regulations which lays on the Organisation the duty to account for its decisions. Since the Administration gave no plausible reason for it, the increase is arbitrary and shows abuse of authority besides. In their view an increase of 50 to 60 per cent would have been reasonable.

They seek the quashing of the impugned decisions and all consequent redress. They also claim costs.

C. In its reply the EPO observes that the only material issue is the rise in the rate of contribution to permanent invalidity insurance. The complainants plead breach of Article 38 on the ground that the General Advisory Committee was not advised of other changes in the collective contract such as the term of the insurance. But, says the EPO, that is immaterial because those changes bear no relation to rate-fixing, dealt with in endorsement 27.

According to the Organisation, the Committee was consulted in accordance with the rules and in good faith: the Administration forwarded to it all the information available so it was able to reach its conclusions advisedly, as the Appeals Committee noted. There is therefore no substance to the plea that the EPO failed in its duty to account for its decisions.

There were objective reasons for increasing the rate of contribution for permanent invalidity insurance: between 1994 and 1996 Van Breda registered a deficit in death and permanent invalidity insurance. The complainants have not proved their assertion that a 60 per cent rise would have been reasonable: the figure is hypothetical and unverifiable. That being so they are hardly in a position to accuse the EPO of arbitrariness, abuse of authority and failure in its duty of care towards staff. The President has shown care: the death and permanent invalidity insurance scheme is to be reformed and an internal insurance scheme is to be introduced as from 1 January 2002, and his intention is to have the EPO bear the administrative costs, to make risk sharing more equitable and to lower contributions in general.

D. The complainants maintain that the term of the contract is material to the issue of contributions: had it been consulted the General Advisory Committee could have expressed its approval of a shorter term, since the contribution rate had been challenged and it applies for the duration of the contract.

They point out that between 1993 and 1997 Van Breda recorded a deficit in permanent invalidity insurance only. It was largely attributable to the group of officials recruited prior to 10 June 1983, and so it was the premiums paid by the latter group that should have been increased. The deficit caused by staff recruited from that date was only "slight". Their premiums should therefore have been increased by just a reasonable amount. By imposing a large increase the EPO was able to maintain its own contribution at the previous level. Had it imposed a similar increase on staff recruited before 10 June 1983, it would have had to bear the cost in full: the statutory limit of 0.6 per cent having been attained, the staff contribution rate could not have been raised any higher. The EPO thus passed on costs it should have borne itself to staff recruited after 10 June 1983, although the risk they constituted as a group had not so increased as to warrant such a decision.

In the complainants' submission, the hypothetical 60 per cent increase they proposed was unverifiable only as to detail. As an estimate it is perfectly reliable and relevant. It was for the EPO to work out the exact figures.

E. In its surrejoinder the EPO asserts that the complainants' approach of separating staff into two quite distinct groups is not valid because it overlooks the fact that both groups have exactly the same cover for permanent invalidity until the age of fifty-five. A system that bases the contribution rate on a core – common to both groups – supplemented by provisions that take account of their differences is in keeping with solidarity, a principle the complainants overlook and which by definition cannot affect anyone adversely. Lastly, contrary to the complainants' assertion, the increase in the rate of contribution is due to a rise in the number of cases of invalidity affecting staff members of under fifty-five recruited after 10 June 1983.

CONSIDERATIONS

1. Staff of the European Patent Office are covered by insurance against permanent invalidity involving total incapacity for work. To protect its staff against the risk of sickness, death and permanent invalidity in 1977 the EPO concluded a collective insurance contract with a European group of insurers for a renewable term of five years. Management of the policy was entrusted to the insurance brokers Van Breda. At the end of the period from 1993 to 1997, it was decided that the term of the contract would be reduced to three years and that the rate of contributions of some members of staff would be adjusted.

2. For permanent invalidity premiums and coverage the EPO has drawn a distinction since 1989 between staff recruited from 10 June 1983 and those recruited before that date. The former have had the lump sum due to them in the event of permanent invalidity reduced by 20 per cent a year between the age of fifty-six and sixty – at which time the coverage ends. Before changes came in on 1 January 1998, their contribution was equal to 0.0495 per cent of their basic salary until the age of fifty-five and thereafter diminished progressively until the age of sixty. For staff recruited prior to 10 June 1983, however, the conditions that applied before the reform were maintained: there was no reduction in the lump sum as their age increased, and it remained payable until the age of sixty-five. The contribution paid by this group is accordingly much higher than that of staff recruited from 10 June 1983: from 0.2112 per cent of basic salary in 1989, it has risen to 0.457 per cent since 1993.

3. Van Breda having informed the Office that the number of invalidity cases had increased sharply between 1993 and 1996 and exceeded the estimates used as the basis for setting premiums, it was decided to review rates. An endorsement, No. 27, stipulated that the overall premium paid by staff appointed as from 10 June 1983 would be increased from 0.0045 per cent to 0.0176 per cent of the total of the capital guaranteed by the permanent invalidity insurance. By Circular No. 247 of 23 January 1998, the Vice-President in charge of Directorate-General 4 informed all staff of the implications of the review: the contributions to be paid by staff recruited

from 10 June 1983 – set by the rules at one third of the total amount due to the insurer – would be increased from 0.0495 per cent to 0.1936 per cent of basic salary. That was equal to an increase of 290 per cent. The contribution rate for staff recruited prior to 10 June 1983 remained unchanged.

4. Having received at the end of January 1998 pay slips constituting the first decisions applying to them individually Circular No. 247 on the new contribution rates, some members of staff sent notices of appeal to the President of the Office seeking the quashing of those decisions. They cited the fact that the deductions from their pay offended against the provisions of Article 84 of the Service Regulations and the duty of loyalty and care an international organisation owes to its staff. They added that the decisions they were challenging had been taken without consulting the General Advisory Committee as the rules require.

5. Deeming that he was unable to allow their appeals, the President of the Office referred them to the Appeals Committee.

6. In its report of 6 July 2000 the Committee found that only the appeals of staff appointed as from 10 June 1983 were receivable: those appointed before then were not affected by the increase in contributions, which neither party denied. The Committee found by a majority that, contrary to the appellants' assertion, there had been nothing improper about the consultation of the General Advisory Committee, as the Office had given it sufficient information in view of the time available and the fact that the staff had been represented by an observer at the negotiations with Van Breda before the contract was reviewed. On the merits, however, the Committee unanimously recommended allowing the appeal and quashing the increase in the contributions of staff recruited as from 10 June 1983. It found that, although a comparison of the death and permanent invalidity benefits paid out and the amount of the premiums paid in under the same heads showed a clear deficit for the period from 1993 to 1996, it was not possible to determine from the documents produced by the Administration the type and group of insured persons responsible for the deficit. Before the contract was amended the Organisation had provided no information about the premiums paid by staff recruited from 10 June 1983. It also failed to

show that the benefits paid out had shifted from staff appointed before 10 June 1983 to those recruited as from that date. Consequently the Committee considered that the EPO had not objectively justified in any way which could be verified the 290 per cent increase in the rate of contribution.

7. In letters of 7 September 2000 the President announced his decision not to follow the Committee's recommendation, and rejected the appeals. Two staff members recruited after 10 June 1983 are asking the Tribunal to quash those decisions and award them all consequent redress. Since the complaints raise the same issues, they will be joined to form the subject of a single ruling.

8. For the most part the complainants adduce the same arguments as before the Appeals Committee. They submit that the procedure whereby the General Advisory Committee was consulted fell short of the requirements of Article 38 of the Service Regulations and the case law, and offended against the principle of good faith. On the merits they contend that the increase in the rate of contributions of staff recruited as from 10 June 1983 was not based on objective consideration. They further plead misuse of authority and breach of Article 84(4) of the Service Regulations which says that "One third of the contribution ... which is required to meet the insurance of the risks [of death and permanent invalidity] shall be charged to the employee".

9. They add, in their complaints to the Tribunal, that the General Advisory Committee was not consulted before other amendments to the collective insurance contract were agreed on, particularly the reduction from five to three years of its term. Those changes – introduced by endorsement 26 – are, as the Organisation says, immaterial to this case, which is about the rate of contribution as set in endorsement 27.

10. Before the decision was taken to sign endorsement 27 (it was apparently not taken until January 1998 – though there is no evidence as to the exact date – and was in any event notified to staff by Circular No. 247 of 23 January 1998) the General Advisory Committee was consulted and did discuss both the proposal to increase premiums and a draft of Circular 247

at its 123rd meeting held on 17 and 18 December 1997. It had some data on which to base an opinion, including the number of cases of invalidity for the period from 1987 to 1996, the amount of the premiums paid by the Office from 1988 to 1996, and the permanent invalidity benefits paid out by Van Breda between 1993 and 1997 broken down as between staff recruited as from 10 June 1983 or prior to that date. But it had no data on the premiums paid by the group of staff recruited after 10 June 1983, which meant that the staff representatives had no way of knowing whether, and if so to what extent, there was a deficit in the invalidity insurance covering this group. It was because they lacked this information that the members of the General Advisory Committee appointed by the Staff Committee "were not in a position to give an opinion", according to a note from the Chairperson of the Committee dated 21 January 1998, whereas the members appointed by the President had voted in favour.

11. Article 38(3) of the Service Regulations confers on the General Advisory Committee the duty to give a "reasoned opinion" on "any proposal which concerns the whole or part of the staff", except in cases of obvious urgency. According to the case law (see Judgments 1062, *in re Hofmann*, No. 2, and 1291, *in re Hofmann*, No. 3), consultation under Article 38 means giving the General Advisory Committee enough information for it to come to a reasoned opinion. In both those cases the impugned decision was quashed for lack of such information. But the case at bar is different in that relevant available information was sent to the Committee and the latter was in a position to give an opinion even if it found the documents prepared by the Administration to be wanting. It would undoubtedly have preferred the data on the premiums paid by the Office to be broken down according to date of recruitment. But such information had not been prepared and so was not available when the Committee was consulted. If the Administration did not include such data, it was in all likelihood because it considered that in setting premiums it was more appropriate to take the staff as a whole regardless of the date of their recruitment. However, the consultation cannot be regarded as formally flawed and the Tribunal cannot allow the plea that the Administration acted in bad faith by choosing deliberately not to give the Committee the necessary information or by transmitting it belatedly.

12. As the Appeals Committee rightly noted, the issue to be settled is whether the 290 per cent increase in the premiums to be paid by staff recruited after 10 June 1983 towards the cost of invalidity insurance is objectively justified by considerations which are able to be verified.

13. The complainants submit that the rate set for them was set far too high: in order to deal with the deficit in the scheme run by Van Breda the Organisation should have worked out, on the basis of the number of contingencies that occurred in each group, how far it was attributable to staff recruited before 10 June 1983 and how far to staff recruited after that date. But it declined to do so and made staff recruited after 10 June 1983 bear the brunt of redressing the balance of the scheme. According to their reckoning, which the EPO rebuts as being based on a wrong assumption, the amount of the deficit attributable to the group recruited before 10 June 1983 is approximately 2.7 million German marks, whereas that attributable to staff recruited after that date is only 750,000 marks. Indeed the second group shows no deficit at all if death insurance is included. In their submission the EPO chose not to change the contribution rate of staff recruited before 10 June 1983 because in total their contributions already amounted to 0.6 per cent of their basic salary, the maximum allowed by Article 84(4) of the Service Regulations. Consequently, the EPO itself would have had to bear the cost of any increase.

14. In rebuttal the Organisation cites the notion of solidarity whereby everyone gets the same benefits until the age of fifty-five regardless of when they were recruited. That idea underlies the reform, accepted by staff, that will come in on 1 January 2002 and which will no longer involve an external insurer. Staff recruited as from 10 June 1983 paid a very low contribution, yet the onset of invalidity in the group is occurring at an earlier age, so more of them are receiving full invalidity benefits than previously estimated. To increase their contribution is therefore neither arbitrary nor unreasonable, bearing in mind that the competent authority has a measure of discretion in the matter.

15. The Tribunal acknowledges that some discretion must be allowed, since contribution rates are set on the basis of estimates which are not

infallible. Calculation of risks for the purpose of determining premiums must nevertheless be based on groups of staff with the same characteristics. Yet, as the complainants rightly noted, staff recruited before 10 June 1983 are in a different position from those recruited thereafter. Among other things they enjoyed much broader coverage, as stated under 2 above. Under the scheme that applied when the insurance contract was renewed, in terms of guarantees offered that difference warranted a difference in contribution rates. In setting new rates in order to remedy the overall deficit, the EPO should have ascertained how far it was attributable to each of the two groups in terms of benefits paid out, and made the necessary adjustments taking into account the amount of the contributions paid by each group. But it failed to do so. Instead it treated all staff as a single homogeneous group for the only reason that their entitlements are the same up to the age of fifty-five. Without any objective reasons the EPO thus placed on staff recruited after 10 June 1983 the entire burden of redressing the balance by imposing a large increase on their contribution rate.

16. In these circumstances, the Tribunal is bound to set aside the impugned decisions, there being no need to rule on the complainants' other pleas. The case must be sent back for the Organisation to repay to the complainants the excess withheld plus interest at 8 per cent a year from the date at which the amounts were withheld from their monthly salary. The Organisation is free to set new contribution rates with retroactive effect on the basis of considerations which are objective and known to staff.

17. Since they succeed, the complainants are entitled to an overall award of costs which the Tribunal sets at 4,000 euros.

DECISION

For the above reasons,

1. The decisions taken on 7 September 2000 by the President of the Office are set aside.
2. The case is sent back so that the EPO may follow the procedure set out under 16.
3. The EPO shall pay the complainants an overall amount of 4,000 euros in costs.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Cuvillier (No. 4)

Judgment No. 2111

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs Rolande Cuvillier against the International Labour Organization (ILO) on 4 December 2000, the ILO's reply of 27 February 2001, the complainant's rejoinder of 3 May, the Organization's surrejoinder of 23 July, the complainant's further observations of 3 September and the ILO's comments thereon dated 3 October 2001;

Considering Articles II, paragraphs 1 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who has British and French nationality and is resident in Switzerland, was an official of the International Labour Office (ILO), the secretariat of the International Labour Organization, from 1959 to 1987. She took early retirement on 1 March 1987, when she was Chief of the Salaried Employees and Professional Workers Branch, at grade D.1.

On 26 July 2000, she filed an internal complaint with the Director-General under Article 13.2 of the Staff Regulations alleging "unjustified treatment inconsistent with the status of an official". She contested: (1) the

non-establishment of a tribunal as envisaged in Article 27 of the Agreement between the Swiss Federal Council and the ILO concerning the legal status of the Organization in Switzerland (hereinafter the "Headquarters Agreement"); (2) the refusal of the Office to issue her with an attestation "that the legal relationship [of the complainant] with the Organization has not ended and that [her] retirement benefits are a public service pension"; and (3) the failure of the Administration to inform officials "of the letter from the Swiss Mission, due to the fact that it had given rise to disputes and the ensuing court rulings [by the Swiss Federal Tribunal]". The complainant asked the Director-General to acknowledge that the letter of 17 December 1984 (hereinafter the "*note verbale*") had been received by the ILO, to indicate the action that he intended to take thereon, giving her reasons, and to undertake to do what was necessary for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement.

By a letter of 5 September 2000, the Director of the Office of the Director-General replied that her communication could not be considered as an internal complaint under Article 13.2, as it did not concern treatment that was inconsistent with the Staff Regulations; even if this communication addressed rights arising out of the complainant's employment in the Office, her complaint would be out of time, as the Office had already replied to the issues it raised by letters dated 31 July and 14 December 1989. Finally, insofar as she intended to obtain a clear position from the Swiss authorities and the international organisations in the United Nations Common System on the tax status of retirement pensions paid in Switzerland by the United Nations Joint Staff Pension Fund (UNJSPF), her communication was devoid of purpose, since both the Swiss authorities and the Office had clearly indicated that such pensions were liable to taxation in Switzerland.

That is the impugned decision.

* On 17 December 1984 the Permanent Mission of Switzerland to the International Organisations in Geneva had sent a *note verbale* informing them that the retirement pensions of former officials who did not have Swiss nationality would no longer be exempt from taxation as from 1 January 1985.

B. The complainant asserts that this complaint is receivable under Article II, paragraph 1, of the Statute of the Tribunal, and that her internal complaint was receivable under Article 13.2 of the Staff Regulations. She contends that the Office misrepresented her internal complaint and reaffirms that "there was indeed treatment inconsistent with the Staff Regulations and the fundamental principles of the Organization ... and unjustifiable treatment by the Director-General".

On the merits, the complainant has several pleas in support of her claim that the retirement pension is not liable to taxation at the national level.

The retirement pension is taxed at the international level under the terms of the Staff Regulations by means of the monthly deduction from pay for the contributions by officials to the UNJSPF. It has the same legal character as their salary, of which it is the extension after employment has come to an end.

The resources pooled by member States, to finance the retirement pension, confer upon it immunity from taxation at the national level by virtue of a fundamental principle governing the operation of the ILO, namely equality between member States.

The Staff Regulations confer upon officials an individual right to the privileges and immunities enjoyed by the ILO under the relevant treaties insofar as their conditions of employment are concerned. Article 1.7 of the Staff Regulations "bears witness to the existence of such a right" and serves in practice to bring such privileges and immunities within the sphere of conditions of employment.

Officials are entitled to the jurisdictional guarantees set out in the Staff Regulations or deriving therefrom. In the event of disputes, their rights include recognition of the competence of the Tribunal, to which they are entitled to appeal.

The *note verbale* of 17 December 1984 implicitly denies that international pensions are covered by public international law, or by the rights of civil servants; in the first place, it refers to the rules of agreements on double taxation, which cover pensions outside the civil service; and secondly it adds that "the taxpayers concerned ... no longer by definition have a legal relationship with the organisations by which they

were employed". However, in 1984 the United Nations Administrative Tribunal found that retirement benefits have the same legal nature as salaries and, in 1989, the ILO Administrative Tribunal dismissed word for word any denial of the continuation of the legal link with the Organization in finding in Judgment 986 (*in re Ayoub No. 2* and others) that "the relations of staff with an international organisation do not end when they leave its employ".

The complainant then sets out her claims against the ILO.

She says that the Office provided her with ambiguous replies (for example, with regard to the establishment of the "arbitration tribunal" envisaged in Article 27 of the Headquarters Agreement), concealed the *note verbale* and provided her with false information (for example, on the Organization's position).

She argues that the tax exemption of United Nations retirement pensions is in fact left to the good will of each State. As a result, there is no legal security regarding double taxation, and retirees of the United Nations will certainly be liable to double taxation if they live in a State which taxes the international retirement pension.

Lastly, in the view of the complainant, it is necessary to establish the arbitration tribunal: officials have an individual right to this jurisdictional guarantee, and prohibition of the denial of justice is one of the general principles of law.

She asks the Tribunal:

- "1. ... to order the Director-General to:
 - a) acknowledge that the letter from the Swiss Mission was received by the ILO;
 - b) indicate its position concerning this letter; and
 - c) in any event, make the necessary arrangements for the determining legal classification to be duly recognized.
2. ... to order the Director-General to make the necessary arrangements without delay for the establishment of the arbitration tribunal envisaged under the Headquarters Agreement.
3. ... to reserve [her] rights:
 - a) to pursue the action that she has taken in this respect for as long as the tax status of retirement benefits has not been legally clarified in a manner which complies with the Staff Regulations and the fundamental principles of the Organization; and
 - b) to any damages deriving from this right when it is recognized.

4. ... to grant [her] compensation for costs in the amount of 5,000 Swiss francs in respect of this complaint."

C. In its reply, recalling the terms of Article II, paragraph 1, of the Statute of the Tribunal, the ILO observes that the complainant is not alleging any breach of regulations or contractual clauses, and that the omissions and refusals which she holds against the Office do not correspond to any right recognised in the Staff Regulations or her contract of appointment when she was in its employ. It says that the complainant - and her husband, whose claims she took up after his death - has been attempting unsuccessfully since 1988 to involve the ILO in a dispute which has arisen between her, as a retiree, and the Swiss tax authorities concerning the tax liability of the retirement pension provided to her by UNJSPF. But the Federal Tribunal gave a definitive ruling on the matter on 6 December 1996.

The ILO asserts that the complainant is wrong in contending that retirees of an international secretariat are and remain officials within the meaning of staff regulations and headquarters agreements and must benefit from the immunities, particularly in tax matters, conferred upon the organisation. It recalls that in a similar case the Tribunal found that "on expiry of the complainant's contract, he ceased to be a staff member" (see Judgment 1845, *in re Palma No. 5*, under 10). Nor do any rules give retirees from the international civil service, any more than current officials, an individual right to benefit from the privileges and immunities conferred upon the organisation with the sole object of enabling it to discharge its mandate. It also denies that officials have an individual right to the jurisdictional guarantee that would be afforded, in the complainant's view, by the tribunal envisaged in Article 27 of the Headquarters Agreement. This Agreement does not form part of the terms of appointment of officials of the Office, or of the Staff Regulations. The competence conferred upon the above tribunal excludes any recourse to it by officials themselves, and even more so by retirees.

The ILO asks the Tribunal to find that it is not competent *ratione materiae* and *ratione personae*, under Article II, paragraph 7, of its Statute, to entertain the complaint.

Subsidiarily, the Organization submits that the complainant's claims are irreceivable.

The *note verbale* which was addressed to all the international organisations based in Geneva, was received by the Office. The complainant cannot claim that the contents of this note were "unknown" to her or that the position of the host country was "concealed" by the Office. "Acknowledgement" of the receipt of the *note verbale*, even if the Tribunal were competent to order it, would not change the Organization's position. Claim 1(a), which is of no general or individual interest to the complainant, is accordingly without cause of action and therefore irreceivable.

The ILO adds that claims 1(b) and (c) are irreceivable because they are out of time. They reiterate claims made by the complainant (or her husband) on numerous occasions, to which clear replies were given, firstly, in a letter from the Director of the Office of the Director-General dated 31 July 1989 and, secondly, in a letter from the Deputy Legal Adviser of 10 January 1997. Neither the complainant nor her husband challenged these replies in any way at the time, and certainly not by means of an internal complaint under Article 13.2 of the Staff Regulations. The request made in her communication of 26 July 2000 to the Director-General was accordingly merely an attempt to set the clock back. It was therefore irreceivable under Article 13.2, as is her present complaint.

Claim 2 is also irreceivable. The tribunal envisaged in Article 27 of the Headquarters Agreement can only be established through negotiation between the Swiss authorities and the Organization, and this would lie solely within their competence.

Nor is claim 3(a) receivable because, firstly, it is in breach of the rules on the time limits for appeals and, secondly, by setting no precise limit, it would prejudice the principle of stability of the legal situation.

The ILO asserts that the principle of equality between States, which is at the very heart of international law, should not be cited to serve strictly private interests. The taxation of retirement pensions is not encompassed by this principle, which is one of the bases for the tax exemption of international officials' salaries.

Lastly, the ILO recalls that the complainant and her husband have had recourse to Swiss jurisdictions. It is therefore particularly inappropriate, in the context of a complaint to this Tribunal, and in view of the fact that their claims before the competent national jurisdictions have failed, to plead denial of justice.

D. In her rejoinder the complainant reaffirms that the Tribunal is competent to entertain her complaint. She challenges the ILO's assertion that her retirement benefit is a pension provided by the UNJSPF, in disregard of Judgment 990 (*in re Cuvillier No. 3*), which shows the contrary. She submits that "the retirement pension that is due from the Organization and paid through the UNJSPF, is paid in part in [her] case by the Organization without going through the former".

The complainant also contends that the measures she is asking the Tribunal to order lie within its power of review. She endeavours to show that her claims are not only receivable, but also fully justified.

She rebuts the argument that it is necessary to be an official to benefit from the Organization's immunities, and that retirees have ceased to be officials. In her view, this link does not need to be established, as the tax immunity derives from the funds used to finance pay. The purpose and basis of this immunity is equality between States and it is the result of the origins of the funds (paid by member States). Financed from the same source as the salaries of active officials, retirement pensions are automatically covered by tax immunity.

The complainant asserts that, for the Tribunal and for the purposes of the Staff Regulations, the concept of "official" encompasses retirees. For the purposes of the Staff Regulations, which apply to officials without defining the term, the salient factor is the right to have recourse to the provisions therein. These cover some situations which are clearly only of interest to active officials, but also others which explicitly concern retired officials, or active staff members as future retirees, or both active staff members and retirees without distinction. In support of her argument, she cites various provisions of the Staff Regulations.

E. In its surrejoinder the ILO points out that the application to retired officials of the provisions on which the complainant bases her argument is established in each case by an explicit reference for a precise purpose. It is therefore absurd and contrary to the Staff Regulations to consider that provisions which do not refer to retired staff members, either directly or indirectly through reference to another text, are applicable to them.

The ILO recalls that in Judgment 990 the Tribunal dismissed the complainant's claim that it should order a recalculation of her pension, on the grounds that "the body that determines the pension is outside its jurisdiction". It also decided that "the complainant is entitled, at the date of each payment of pension by the Fund, to compensation from the ILO in an amount equal to the difference between the pension she was entitled to under the Staff Regulations and the pension she has actually received since 1 March 1987." It says that the complainant cannot modify at her every whim the nature of the payment, which is compensation, made by the Organization under the terms of Judgment 990.

It submits that, while the origin of the funds financing salaries provides the basis for the tax exemption conferred upon the Organization, as a counterpart for equality between member States, the enjoyment of this immunity by certain categories of persons is intended to allow, as indicated in Article 40 of the Constitution of the ILO, "the independent exercise of their functions in connection with the Organization".

The ILO presses its objections to the receivability of the internal complaint and, consequently on the same grounds, of the complaint before the Tribunal.

F. In further observations, based on the letters sent to her by the Office, the complainant asserts that it pays her a "pension supplement". As explained in Judgment 990, it is because the body that determines the pension is outside the Tribunal's jurisdiction that this supplement is paid by way of compensation. But she says that it is indeed a pension supplement in an amount equal to the difference between the amount to which she is entitled under the Regulations of the UNJSPF and the amount to which she is entitled under the Staff Regulations.

Lastly, she states that Switzerland exonerated the retirement pensions of non-Swiss nationals from taxation up to the end of 1984.

G. In its comments the ILO denies that the compensation it pays the complainant under Judgment 990 is a "pension supplement". Nothing in the regulations or rules calls for the payment of such a supplement to a former official.

It explains that the *note verbale* did not create an entirely new situation for retirees. The conditions respecting the taxation of former international officials changed, but not the principle of their tax liability.

The Organization adds that, while it appeared appropriate in 1946, as suggested by the then Secretary-General of the United Nations, to examine the situation of pensions in relation to the general problem of immunities, it has to be recognized that the solution adopted is not that advocated by the complainant.

Lastly, it says that it is not within its competence to proceed further on an issue which lies within the mandate of the United Nations General Assembly and the UNJSPF.

CONSIDERATIONS

1. The complainant, who is resident in Switzerland, was an official of the ILO from 1959 to 1987 and has been receiving a retirement pension since 1 March 1987, when she was granted early retirement. Since then she has continued to challenge, through both the Federal and Genevan tax authorities and the ILO, the right of Switzerland to tax her pension. Having never succeeded, and in particular having had appeals to the Swiss Federal Tribunal rejected on 6 December 1996 and 19 June 1997, she filed an internal complaint with the Director-General of the ILO on 26 July 2000 under Article 13.2 of the Staff Regulations against "unjustified treatment inconsistent with the status of an official". In her internal complaint she alleged that the ILO had allowed a situation of non-law to develop, had wrongly supported the position of the Swiss authorities and had disregarded the fact that the "salaries, emoluments and indemnities", exonerated from taxes under Article 17(b) of the

Headquarters Agreement concluded between Switzerland and the ILO, also included pensions. She requested the Director-General to:

- acknowledge that the *note verbale* of 17 December 1984 of the Permanent Mission of Switzerland addressed to the international organisations based in Geneva respecting the tax liability of retired officials in Switzerland had indeed been received by the ILO;
- provide an indication of the action he intended to take thereon, giving his reasons; and
- undertake to do what was necessary for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement.

She reserved her right to compensation once the legal situation had been clarified.

2. The Director of the Office of the Director-General replied to this "internal complaint" on 5 September 2000 by indicating that the complainant could not have recourse to Article 13.2 of the Staff Regulations as her claims were not related to treatment inconsistent with the Staff Regulations, unjustifiable treatment by a superior official or rights deriving from the duties discharged by her when she worked. The complainant was also reminded that the Office had already replied to her claims on 31 July and 14 December 1989 and that the Swiss authorities as well as the Office had made it known from the beginning that "UNJSPF periodical pension benefits [were] liable to taxation in Switzerland".

3. Dissatisfied with this reply, the complainant came to the Tribunal asking for the decision contained in the letter of 5 September 2000 to be set aside. She asks the Tribunal to order the Director-General to acknowledge that the *note verbale* from the Swiss Mission had indeed been received by the ILO, to make known his position on this communication, to "make the necessary arrangements for the determining legal classification to be duly recognized", and to take steps for the establishment of the tribunal envisaged in the Headquarters Agreement. Lastly, she asks that her rights be reserved and that she be compensated for the costs incurred.

4. In response the ILO argues that the Tribunal is not competent to entertain the complaint, and pleads irreceivability on several grounds.

5. The dispute concerns the dismissal of an internal complaint filed under Article 13.2 of the Staff Regulations, which reads as follows:

"Any complaint by an official that he has been treated inconsistently with the provisions of these Regulations, or with the terms of his contract of employment, or that he has been subjected to unjustifiable or unfair treatment by a superior official shall, except as may be otherwise provided in these Regulations, be addressed to the Director-General through the official's responsible chief and through the Personnel Department, within six months of the treatment complained of. ..."

6. In principle, this provision only entitles an "official", who considers that she or he is entitled to do so, to have an internal complaint examined according to the established procedure. However, the Tribunal acknowledges that the relationship between officials and international organisations does not come to an end when they cease to work (see in this respect Judgment 986). It must therefore be recognised that former officials who consider that the terms of their contracts of employment or staff regulations have been disregarded, or that the administration has not accorded them the protection and guarantees deriving from their position as international civil servants, may avail themselves of the means of recourse available for the recognition of their rights, and therefore seek redress under Article 13.2 of the Staff Regulations. It should also be noted that in the impugned decision the competent authority did not tell the complainant that her capacity as a former official prevented her from filing an internal complaint under Article 13.2, but that it rejected her complaint on the grounds that, *ratione materiae*, it did not lie within the scope of the article and was moreover out of time.

7. As pointed out by the ILO, the Tribunal's competence is admittedly limited, in accordance with Article II, paragraph 1, of its Statute, to "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case". But this provision does not prevent the Tribunal from ruling on complaints filed by officials of international organisations who no longer

work and consider that, following their retirement, they have suffered injury to the rights and guarantees conferred upon them by their status.

In the present case the complainant reproaches the Organization with failing to provide the protection, to which she considers herself entitled, to establish her tax exoneration.

8. While the Tribunal is competent to judge whether the impugned decision is well-founded, to do so the complaint still has to be receivable. In this respect, the ILO's pleas of irreceivability must succeed.

9. In the first place, the evidence shows that, although the complainant is asking what action will be taken pursuant to the *note verbale* from the Permanent Mission of Switzerland, which was clearly received by the ILO and is among the submissions produced by the complainant, her real motive is to exhort the Organization to contest the letter, according to which "as from 1 January 1985 ... taxpayers who are retirees of the organisations will be taxed in accordance with normal law and shall submit a complete tax declaration including all their earnings and assets". This issue has been raised in many letters addressed to the ILO - either by the complainant's spouse, also a retired official of the ILO and now deceased, or by the complainant herself, or by both of them - which have either explicitly or implicitly received negative replies. Even though the letters dismissing her argument that the pensions are not liable to taxation do not refer to the *note verbale*, there is no evidence that the ILO endeavoured to conceal it with a view to misleading its officials. In any case, the complainant is wrong to use the Article 13.2 procedure to challenge decisions, reached long ago, not to contest the position of the Swiss authorities with regard to the legal status of the pensions paid to former international civil servants and the issue of their tax liability.

10. Secondly, the claims that the ILO should be ordered to make the necessary arrangements for the establishment of the tribunal envisaged in Article 27 of the Headquarters Agreement are also irreceivable: they have already been rejected in earlier decisions which were not challenged in time, and the Tribunal is not competent to issue orders to organisations

which have recognised its jurisdiction (in this respect see, *inter alia*, Judgment 501, *in re Petruc*).

11. Lastly, there is no evidence that the ILO failed in its duty of protection towards its officials and, where appropriate, former officials. And the complainant clearly cannot challenge the decision of the Swiss Federal Tribunal through the ILO, or through this Tribunal.

12. Moreover, while the complainant considers that she has grounds for challenging the fact that the further observations which she was authorised to submit were forwarded to the ILO, the Tribunal finds that, far from tainting the procedure, as she claims, it ensured strict compliance with the principles of adversarial proceedings.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Nasrawin

Judgment No. 2112

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Adnan Nasrawin against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 March 2001, UNESCO's reply of 10 May, the complainant's rejoinder of 27 June, the Organization's surrejoinder of 30 July, the complainant's further brief of 10 September and UNESCO's comments thereon of 2 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Jordanian citizen born in 1950, joined UNESCO in 1997 under consultancy contracts. On 1 January 1998 he was given a temporary appointment for eleven months at the Office of Publication Information (OPI) as an information officer at grade P.3. His appointment was extended three times until 31 December 1999. His post having been upgraded to P.4, he was promoted on 1 June 1999.

By a memorandum of 9 June 1999 the Director of the Executive Office of the Director-General informed the Director of the Bureau of Personnel and the Director of the OPI that the "Director-General [had] decided to create a P-4 post in the OPI as from 1 July 1999 ... and to

appoint Mr Nasrawin to it ... on a fixed-term contract for two years". On 12 October he told the Director of the OPI and the Assistant Director-General of the Sector of Social and Human Sciences (SHS) that the Director-General had decided to transfer the complainant "with his post" from the OPI to the SHS as from 1 October 1999. Then in a letter of 9 November, a copy of which was sent to the above-mentioned officials, he informed the Director of the Budget Office that another post - at grade P.3 - which was to be created in the OPI under the draft programme and budget for the 2000-2001 biennium (document 30 C/5) would be transferred to the SHS and reclassified as P.4 to match the complainant's grade.

A new Director-General was appointed on 12 November 1999 and took up office on 15 November. On the same day the General Conference adopted a resolution, 30 C/72, inviting the new Director-General, among other things, "to review, with the aim of ensuring that the financial impact has been taken into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". By a note of 26 November the Director-General told senior officials that he had "decided to suspend temporarily the implementation of the most recent decisions - i.e. those taken as of 1 October 1999 - relating to appointments, reclassifications and promotions".

By a memorandum of 20 December 1999 the Director of Personnel informed the complainant that there would be no funding for his post as from 31 December so his appointment would not be renewed. The Director-General had nonetheless decided by way of an exception to pay him two months' salary in lieu of notice. On 18 January 2000 the acting Director of the Bureau of Personnel confirmed in writing to the complainant the Director-General's decision to grant him a "moratorium" of two months in the form of an extension of contract enabling his position to be reconsidered in the course of drawing up the staffing table for the 2000-2001 biennium. The complainant accepted the proposal in a letter of 21 January, adding a reminder about the former Director-General's "decision" to appoint him for two years. In a memorandum of

24 February the acting Director of Personnel informed him, on the Director-General's behalf, that his appointment would not be extended beyond 29 February but that, exceptionally, he would receive an indemnity equal to two months' pay.

The complainant protested in a letter of 3 March 2000. On 22 March the acting Director of Personnel told him that the Director-General upheld the decision to terminate his appointment. The complainant filed a notice of appeal with the Secretary of the Appeals Board on 18 April. In its report of 4 December 2000 the Board criticised the Administration's position and recommended compensating the complainant for moral injury by paying him the equivalent of three months' salary over and above what he had already received. It also recommended that he should be shown particular consideration if he applied for any jobs. In a letter of 31 January 2000, the impugned decision, the Director-General rejected the appeal.

B. The complainant submits that the impugned decision has not been accounted for as it merely refers to the reasons the Administration gave in response to his appeal. The Organization has only addressed the non-renewal of his appointment, but what he is challenging is UNESCO's failure to meet the commitment given on 9 June 1999 to grant him a fixed-term appointment. He is objecting not to the new Director-General's revocation of his predecessor's decision but to the fact that nothing was done to implement that decision between 9 June 1999 and the expiry date of his temporary contract. He contends that the decision to give him a fixed-term appointment was quite lawful because, according to Staff Rule 104.8(b):

"A temporary appointment may, at the discretion of the Director-General, be extended, or converted to a fixed-term appointment ..."

Moreover, the decision came after a recommendation by the Bureau of Personnel and a good performance report in June 1999.

In his submission the Organization may not rely on instructions issued by the General Conference. The complainant cites Judgment 1987 (*in re Dunseth and Mattmann*) which, he says, recalled that an executive head of an organisation may not use a decision by member States as a pretext not to implement an earlier decision adopted lawfully.

He accuses the Director-General of drawing wrong conclusions from the evidence: pursuant to Conference resolution 30 C/72 the Director-General took the decision on 26 November 1999 to suspend implementation of decisions subsequent to 1 October 1999. But the decision concerning his appointment had been taken on 9 June 1999, that is before that date, and the one of 12 October 1999 to transfer him from the OPI to the SHS was not among the categories affected by the decision of 26 November 1999.

He asserts that a table bearing the reference "30 C/5 - Part II Chap. 4" showed that there was a post against which was written "foreseen for Mr Nasrawin". UNESCO's decision of 9 June 1999 being a commitment of a kind that has legal effect, he may plead breach of promise and hence breach of good faith as well as an affront to his professional dignity. He concludes that he has therefore suffered actual material and moral injury.

He asks the Tribunal to order the production of various documents he sought from the Organization, to set aside the impugned decision, to order the Organization to grant him the appointment referred to in the memorandum of 9 June 1999 or some other equivalent appointment, to award him material and moral damages in an amount equal to two-and-a-half years' salary, and costs.

C. In its reply UNESCO points out that its memorandum of 20 December 1999 informing the complainant that his temporary contract would not be renewed also indicated that his post could not be funded beyond 31 December 1999. Consequently, there was no need to repeat the reasons in the final decision of 31 January 2001.

It denies that there was any promise. The memorandum of 9 June 1999 sent by the Director of the Executive Office of the Director-General contained instructions to two heads of service in the secretariat, not a promise to the complainant or an administrative decision to be notified to him. Later correspondence between those officials brought to light that no funds were available to create a post under the current budget (1998-1999 biennium). However, a post was planned in the OPI under the draft programme and budget for the 2000-2001 biennium (document 30 C/5),

not yet approved by the General Conference. The earlier instructions were therefore superseded by new ones issued on 9 November 1999 under which the future post – graded P.3 – would be transferred to the SHS and upgraded to P.4. But the new Director-General decided on 26 November 1999 to suspend his predecessor's decisions subsequent to 1 October 1999, which included therefore the one of 9 November concerning the complainant. UNESCO has submitted a copy to the Tribunal of document 30 C/5, in which there is no mention of the complainant. It cites the Tribunal's case law that "comments that various officials may have made about the complainant's case are immaterial inasmuch as they were never addressed to [the complainant] on the Organization's behalf" (Judgment 1560, *in re Ndédi*). UNESCO having made no commitment to him, he may not claim injury.

In UNESCO's submission the fact that the complainant's case was still pending when the new Director-General took office does not amount to "abuse of authority". It observes that since his appointment in January 1998 he has benefited from more lenient application of the Staff Rules and unusually favourable treatment. As to Rule 104.8(b), which the complainant cites, it was not the purpose of the instructions of 9 November 1999 to convert a temporary into a fixed-term appointment. In any case conversions of that kind have not been possible since 8 November 1990 when Administrative Circular No. 1722 was issued. Lastly, the complainant having agreed to an exceptional extension of his appointment for two months, "the question of the implementation of the former Director-General's instructions became immaterial". UNESCO considers that "the fact of putting an end to abuses and applying the Organization's rules and regulations in a sound and correct manner could in no way be seen as a violation of the principle of equality of treatment or of the rule relating to acquired rights".

UNESCO asks the Tribunal to declare that:

- the Director-General's "instructions" of 9 June 1999 were replaced by those of 12 October, which were superseded by the ones of 9 November 1999;
- the "instructions" had no legal effect;

- the Director-General's decision of 26 November 1999 to suspend recent decisions regarding appointments, reclassifications and promotions, is not flawed;
- the above-mentioned decision applied to decisions concerning the complainant's administrative status; and
- the discussions on the former Director-General's instructions are no longer material since the complainant has agreed to the proposed moratorium.

It also asks the Tribunal to declare that the non-renewal of the complainant's temporary appointment was consistent with the rules in force.

D. In his rejoinder the complainant observes that the new Director-General stated before the Executive Board in October 2000 that decisions prior to 1 October 1999 could be called into question neither from a legal nor from a human point of view.

As to document "30 C/5 - Part II Chap. 4" of which he requested a copy in vain several times, he alleges that UNESCO hid it and sent the Tribunal an unlawfully changed version. Stating that he is ready to disclose his sources and produce evidence of his allegations, he affirms that he saw the document - which has since been torn up - in the offices of the OPI.

He asserts that the Director-General informed him in person on 11 June 1999 about the decision of 9 June, which made good an oral promise given several times since 1997. Staff Regulation 4.3.2, in the version in force until 14 November 1999, said:

"So far as is practicable selection shall be made on a competitive basis."

Being so worded it allowed the Director-General to waive the competition and appoint directly. Indeed, he says, that practice is common at UNESCO. The circumstances of the case ruled on in Judgment 1560 cited by the Organization are different from those of the present case.

He maintains that the memorandum of 9 June 1999 sent by the Director of the Executive Office of the Director-General does constitute a decision, and the Appeals Board found that it ought to be implemented. Moreover, all the criteria for determining the existence of a contract

were met and there is no reason why he should bear the brunt of the Administration's negligence. The decision of 9 November 1999 to transfer him did not invalidate his appointment of 9 June 1999. He observes that after the former Director-General left, several senior officials changed their mind about his appointment. He contends that the Administration has misread his letter of 21 January 2000 agreeing to the moratorium.

He deems libellous UNESCO's assertion that he received unusually favourable treatment: it casts doubts on his professional abilities. He asks the Tribunal to take account of that fact in assessing injury. He also asks the Tribunal to order the disclosure of further documents and presses his other claims.

E. In its surrejoinder UNESCO produces copies of several documents requested by the complainant, including the draft programme and budget (reference 30 C/5) and the corresponding final document (reference 30 C/5 approved), neither of which bear the annotation "foreseen for Mr Nasrawin". It observes that the complainant has produced no evidence in support of his allegation that a document with his name on it was hidden or torn up.

UNESCO denies that the criteria for showing the existence of a promise were met. As to Regulation 4.3.2, cited by the complainant, it authorises the Director-General to waive the competition procedure in the Organization's interests only where the grade or duties of the post so require. That was not the case here. It denies casting doubts on the complainant's professional ability.

F. In a further brief the complainant submits the transcript of a telephone conversation he had on 6 June 2001 with an official in the Administrative Unit of the OPI, which he recorded unbeknown to her. It proves, he says, that the document "30 C/5 - Part II Chap. 4" with the annotation "foreseen for Mr Nasrawin" did exist and was destroyed. It also proves that there was a promise of an appointment.

G. In observations it entered in reply to the complainant's further brief, UNESCO denies possession of any document other than the one it has already produced. Documents for submission to the Organization's

decision-making bodies never refer to individual staff members. Even if another version of the document had existed, it would be of no legal value.

What the recorded conversation shows, says UNESCO, is that the OPI official categorically denied the complainant's allegations. Lastly, the complainant hardly behaved in a manner befitting his status as an international civil servant. In France, such conduct is a penal offence.

CONSIDERATIONS

1. (a) The complainant joined UNESCO in 1997. Having started out under consultancy contracts, on 1 January 1998 he was given a temporary appointment for eleven months in the OPI as an information officer at grade P.3. That appointment was extended three times until 31 December 1999. His post having been upgraded to P.4, he was promoted on 1 June 1999.

(b) On 9 June 1999 the Director of the Executive Office of the Director-General sent a memorandum to the Director of the Bureau of Personnel and the Director of the OPI. It said:

"Having examined the work done by Mr Nasrawin since he enlisted his services in 1997, and in view of his performance as appraised for his promotion to grade P-4, the Director-General has decided to create a P-4 post in the OPI as from 1 July 1999 (as recommended in memo PER/ADM.2.B/98/744 of 7 December 1998) and to appoint Mr Nasrawin to it from the same date on a fixed-term appointment for two years.

A post being planned in 30 C/5, a copy of this memo will be sent to the president of the [High Level Task Force] inviting him to submit a recommendation as to the financing of Mr Nasrawin's services in the last six months of 1999.

I should be grateful if you would make the necessary arrangements to this end."

Copies of the above memorandum were sent to various services. Although given a copy unofficially, the complainant never received official notification of the memorandum.

A new Director-General took office on 15 November 1999. By resolution 30 C/72 adopted at its thirtieth session held from 26 October to 17 November 1999, the General Conference, after noting that there were too many exceptions in the application of personnel policy and the personnel management system, invited the new Director-General "to review, with the aim of ensuring that the financial impact has been taken

into account and the criteria [of competitiveness, expertise, efficiency and universality] have been satisfied, all posts that were reclassified, and all promotions and appointments that were made during the 1998-1999 biennium". Pursuant to that resolution the Director-General decided that "no temporary post ... financed from the staff costs budget or other in-house extra-budgetary funding sources [would] be renewed unless the services rendered [are] specifically linked to a vacant established post and [are] indispensable for programme or project execution". The complainant's case having been examined by an ad hoc task force on Secretariat structure, staffing and management systems, the Director-General found that the complainant's post was not indispensable.

On 20 December 1999 the Director of the Bureau of Personnel told the complainant that his appointment would not be renewed beyond 31 December 1999 but that he would be paid two months' salary in lieu of notice. The acting Director of the Bureau of Personnel wrote to him on 18 January 2000 confirming the Director-General's decision to grant to him and all other officials whose temporary appointments were not renewed, a two-month "moratorium" in the form of an extension of contract so that their positions could be reconsidered in the context of preparing the staffing table for the 2000-2001 biennium. On 21 January 2000 the complainant agreed to the proposal but drew attention to the former Director-General's "decision" to appoint him for two years. He was told on 24 February that his contract would not be extended after 29 February, but that as an exception he would receive an indemnity corresponding to two months' salary.

(c) On 3 March 2000, citing the memorandum of 9 June 1999, the complainant protested to the Director-General asking him to reconsider his decision and to "reinstate" him.

The Director-General having upheld his decision, the complainant filed a notice of appeal on 18 April with the Appeals Board. In its report of 4 December 2000 the Board recommended an award of moral damages and advised that particular consideration should be given to the complainant's candidature if he applied for any posts.

The Director-General rejected the appeal on 31 January 2001. That is the impugned decision.

2. He is asking the Tribunal to quash the impugned decision and to order UNESCO to grant him a fixed-term appointment for two years pursuant to the memorandum of 9 June 1999, or some equivalent appointment. He also claims two-and-a-half years' salary in material and moral damages, and costs. The thrust of his arguments is that, although a number of administrative steps were needed to implement it, the memorandum of 9 June 1999 nevertheless contains a decision by the Director-General to appoint him for two years as from 1 July 1999. Although UNESCO did not notify it to him officially, it informed him of the decision and made a copy of it available. He also appears to consider that by appointing him until 31 December 1999 UNESCO made a start on implementation and should now complete it. He therefore concludes that the decision was notified to him so he may rely on it in putting forth his case. The decision appointed him for two years and he is entitled to demand that it be implemented in full. It constitutes at the very least a promise by the former Director-General which UNESCO is bound to honour. The instructions issued by the General Conference at its thirtieth session do not authorise the Organization to disregard its commitments.

The Organization seeks dismissal of the complaint. It submits that the memorandum of 9 June 1999 is an internal document with no effect in law. Its purpose was merely to lay the ground for later decisions insofar as they were able to be implemented, and it only contained "instructions", so there was no need for notification to the complainant. If it let him have a copy unofficially, it was so that he could see how matters were progressing in view of future decisions concerning him. UNESCO was unable to renew his appointment essentially because it was outside the programme and budget approved by the General Conference – no post matching his duties had been created – and following review by the task force the Director-General found that the complainant's post was not indispensable.

3. The complainant also seeks disclosure of certain documents. The Organization having complied, his claim no longer shows a cause of action. In his rejoinder he sought a hearing of the Chairman of the Appeals Board to prove the contents of a note which, he says, does exist. Since it

pertains to an issue which is not material to the outcome of the case the claim must be dismissed.

4. The complainant challenges the decision not to renew his appointment.

According to a steady line of precedent, such decisions are at the discretion of the appointing authority and as such may not be set aside unless they were taken without authority or in breach of a rule of form or of procedure, or were based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority.

5. The complainant submits that the impugned decision is not accounted for.

According to the case law, except in certain instances – in the event of disciplinary sanctions for example – a decision will be sufficiently accounted for where the staff member is able to learn of the grounds for it so that he may, among other things, challenge them on appeal. But the reasons need not be stated in the actual text notifying the decision. He may learn of them through reference to some other document or even in an answer given by the Administration to some later objection, provided that there is no obstacle to the exercise of his right of appeal (see, for example, Judgment 1590, *in re Nies*).

In this case, the explanation given by UNESCO is beyond reproach. The decision of 20 December 1999 stated the reason for not renewing the complainant's appointment: there were no funds available for the post. The decision of 22 March 2000 rejecting his protest referred the complainant to the reasons given in a memorandum of 24 February from the acting Director of Personnel. And the decision of 31 January 2001 rejecting his internal appeal refers to detailed explanations already given by the Administration. The complainant therefore had ample reasons on which to base an appeal.

The plea fails.

6. The Organization appears to think that the complainant has given up his claim pertaining to the memorandum of 9 June 1999, because he has accepted the moratorium exceptionally extending his appointment for two months and the indemnity paid in lieu of notice. But that is not borne out by the facts. The extension of contract with payment in lieu of notice was neither offered nor accepted as some extra-judicial transaction in which the complainant (and others in like case) would by implication abandon any other claims against the Organization. On the contrary: the complainant expressly drew attention at the time to the former Director-General's "decision" to appoint him for two years, and the Organization raised no objection.

7. The issue to be resolved, therefore, is whether the memorandum of 9 June 1999 contains a decision binding the Organization or a promise, or whether it is simply an internal document.

(a) A decision affecting an official will always be preceded by administrative formalities, but it will become binding on the organisation only when it is notified to the official, in the manner prescribed by the organisation (see Judgment 1560, under 9). Notification may also take some other form as long as it can be inferred from it that the organisation intended to notify the decision.

But information about the formalities themselves is clearly not notification. In the interests of clarity it is desirable, and indeed often the practice, for the person concerned by some future decision to be given such information.¹ But to see it as notification of a decision would be wrong and could lead to serious confusion.

In this case the complainant may have misconstrued the Organization's intent in letting him have, unofficially, a copy of the memorandum of 9 June 1999. But it is clear from the document itself that it contained no decision which was binding on the Organization – or even a policy decision – and that it was not officially notified to him.

True to say, the memorandum does contain the words "the Director-General has decided", and the Director-General is the appointing authority. However, its content reveals that in substance it was not a real "decision" to appoint someone but an internal formality prior to such a

decision. The administrative services were asked to "make the necessary arrangements to this end", which meant that they were to take steps to secure funding for the post in the second half of 1999, and to establish the necessary documents to proceed with an appointment. Had it been a decision to appoint him, the memorandum would have been notified to the complainant.

Consequently, there was no notification of a decision by the appointing authority. The complainant alleges that he was given a copy of the memorandum by the Executive Office of the Director-General, but has never made out that it was accompanied by any kind of promise.

(b) The complainant seems to see confirmation of the final and binding nature of what he terms a "decision" in the fact that it had already been implemented in part by the decision to appoint him for the second half of 1999.

If one saw the latter decision as an indication of UNESCO's wish to appoint the complainant, one could – and indeed the complainant should – also infer that an official decision was necessary in order for the appointment to be made, nothing having been decided as yet for the period after 1999.

(c) Subject to the conditions laid down in the case law, an organisation can, even where there is no decision, be bound by a promise or assurances given to a staff member.

In this case, the fact that the complainant was given a copy of the memorandum of 9 June 1999 clearly did not imply a promise that the formalities would culminate in a decision. There were still uncertainties, particularly regarding the 2000-2001 biennium: there might well be a new Director-General, the budget had not yet been adopted, and a post had to be identified.

In his further brief the complainant tries to prove that the words "foreseen for Mr Nasrawin" were written opposite a specific post in a budget document, or a copy of it kept by the Administration, which the complainant came across by chance. The Organization denies, and the complainant fails to prove, that that was so. In any event, it is immaterial for the reasons stated above. Being for internal administrative purposes

only, the document would not constitute evidence of either a firm commitment or a promise by the Organization to appoint the complainant.

The complainant has produced no other evidence from which the existence of a promise to appoint him can be inferred (even if both he and the former Director-General wanted him to be appointed).

Consequently, he may rely neither on the existence of a contract for a period of two years nor a promise that such a contract would be concluded.

8. The complainant alleges that the procedure followed since the thirtieth session of the General Conference, under the authority of the new Director-General, which led to the non-renewal, was in breach of the rules which the Organization had itself set and which, in his submission, required the decisions and promises of the former Director-General to be implemented.

(a) For the reasons indicated above, the plea is unfounded in that it is based on the consideration that the complainant either had a two-year contract or at least a promise from the former Director-General that such a contract would be granted.

(b) Since there was no such promise, the Organization was not bound to complete the procedure appointing the complainant.

Appointments being at the discretion of the appointing authority, the Tribunal will not interfere. It will determine only whether there was anything unlawful in the procedure.

UNESCO points out that, at its thirtieth session the General Conference found that there had been too many exceptions in the application of staff policy and the personnel management system, and so invited the new Director-General to re-examine all reclassifications, promotions and appointments that were made during the 1998-1999 biennium.

Consequently, as a precautionary measure, on 26 November 1999 the Director-General ordered the suspension of all appointments, reclassifications and promotions decided on since 1 October 1999 and set up a task force to recommend either the maintenance or the cancellation

of those decisions on a case-by-case basis. However, in a memorandum of 9 November 1999 the Chief of the Executive Office of the Director-General informed several services that the Director-General wanted to transfer the complainant's future post, which was to be established in the OPI at grade P.3, to the SHS and upgrade it to P.4. In UNESCO's view, the complainant's case was among those to be reviewed, since the memorandum came after 1 October 1999.

In the complainant's view, he was appointed by the decision of 9 June 1999 so his status could not have been changed after 1 October 1999 and the Director-General's decision of 26 November did not apply to him.

But the Administration did not overstep its discretionary authority by considering that the further instruction in the letter of 9 November 1999 had the effect of applying to the complainant the Director-General's decision of 26 November: it implied change in the complainant's status (which still had to be made official by a decision to be notified to him), it also showed this status was still in progress, which justified the precautionary measure and the review of his case by the task force.

That being so, there is no need to establish whether the situation the complainant was in temporarily itself warranted reconsideration of his case – since his contract was to expire on 31 December 1999 and a decision had to be taken as to its renewal.

Consequently, there is no proof that the Organization broke the rules which it had itself set.

The plea therefore is without merit.

9. The complainant claims compensation for material and moral injury caused by UNESCO's failure to fulfill the "promise" made by the former Director-General to give him a fixed-term appointment and by the affront to his honour and good name.

(a) The ending of his employment relationship with the Organization undoubtedly caused the complainant disappointment, the more so as he knew that the former Director-General wanted to appoint him for two years and had set formalities in motion to that end. However, his termination not being due to some unlawful act or a breach of contract, the Organization cannot be held liable as there has been no especially grave

wrong (see Judgment 447, *in re Quifones*, under 11). The fact that UNESCO kept the complainant abreast of the formalities neither creates nor aggravates liability.

(b) The complainant objects to UNESCO's abrupt treatment of him.

Though he was undoubtedly very upset at the non-renewal of his appointment, nothing in the evidence indicates that the Organization failed, in this instance, in its duty of care.

The complainant sees the Organization's assertion that he benefited from particularly favourable treatment as a slight on his honour. That remark was directed not to the complainant but to the previous administration, and so his honour is intact.

His claim to compensation is therefore unfounded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Bolaños

Judgment No. 2113

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Alvaro Bolaños against the International Atomic Energy Agency (IAEA) on 13 November 2000 and corrected on 26 January 2001, the IAEA's reply of 9 May, the complainant's rejoinder of 19 June and the Agency's surrejoinder of 28 August 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Colombian who was born in 1938, joined the Agency in June 1984 as an Area Officer at grade P.3 in the Latin America Section of the Division of Technical Assistance and Co-operation of the Department of Technical Co-operation. He was given a fixed-term appointment for two years which was extended six times. His appointment ended on 30 November 1999, when he retired.

On 9 February 1987 the Head of the Latin America Section drafted a memorandum assigning projects to staff. The complainant inferred from a handwritten annotation at the bottom of the memorandum that he was to

have the same duties and responsibilities as another official in the section who was at grade P.4. A request for the upgrading of his post submitted in August 1993 and again in December 1996 was rejected.

By a memorandum of 5 March 1999 the complainant asked the Director General to reconsider his case and upgrade him to P.4 as from February 1987. By a letter of 6 July 1999 the Director General replied that, according to a report he had requested from the Division of Personnel and the Department of Technical Co-operation, the complainant's claim was time-barred because in the past he had signed numerous contract extensions, including the most recent one dated 29 April 1998, without ever objecting to his grade. The report also said that his substantive duties remained unchanged and that occasional assignment to higher level duties was a normal part of his work. Upgrading depended on a regular and recurring increase in responsibilities. By a letter of 3 August 1999 the complainant asked the Director General to reconsider the Division of Personnel's finding. But the Director General replied on 13 September that he saw no reason to rescind the decision of 6 July not to upgrade his post, and that the complainant should have gone to the Joint Appeals Board within one month of receiving notification of that decision. On 17 September the complainant lodged an appeal with the Joint Appeals Board against the Director General's decision of 13 September 1999.

In its report of 30 June 2000 the Board found that the memorandum of 9 February 1987 had not assigned the complainant to higher-level duties and responsibilities. It saw the fact that he challenged neither his initial appointment nor its extensions as evidence that he had accepted the terms and conditions of his employment in good faith. It recommended rejecting the appeal, which the Director General did in a letter of 21 July 2000, the impugned decision.

B. The complainant pleads irregularities, breach of the Staff Rules and Regulations and abuse of authority. He observes that before joining the Agency he spent fifteen years performing duties similar to those for which he was recruited, some of the time on a P.4 post. And it was P.4 duties and responsibilities that the Agency assigned to him right from the start, as all his performance reports show. Indeed, his supervisors acknowledged as

much and thought he should be promoted to P.4. Had he challenged the classification of his post on signing his contract, he would have run the risk of losing the appointment.

He observes that the Agency could have settled the matter by simply appointing him to a P.4 post that fell vacant in his section in 1989. But instead, rather than putting it up for competition the Agency gave it to a staff member who lacked the necessary experience, then finally transferred it to another section.

What the Director General conveyed to him on 6 July 1999 were his comments, not a decision, which was why the complainant wrote to him again on 3 August. He contends that the Director General took his decision of 13 September 1999 on the strength of confidential information which was kept from him in breach of the principle of clarity which underpins the rule that staff are to be treated fairly. He alleges that the Administration tried to prevent him from filing an appeal.

He received the letter of 21 July 2000 on 1 August but the Joint Appeals Board's recommendation was not enclosed. The Board's report reached him only on 28 August 2000. He objects to it on the ground that it contains inconsistencies and mistakes. He therefore concludes that the Board's recommendation lacks foundation and that his case has not been treated impartially.

Lastly, he observes that for over twenty years the Agency has been applying a "zero growth" policy, maintaining the same budget however many employees it may need. Numerous officials have been "sacrificed" to the policy, the Agency having failed to classify their posts properly. He cites incidents involving the Director of his division which, he says, had a part in the decisions that affected him adversely. He points out that even though the Agency treated him unfairly he did not let that impair his performance.

He seeks the quashing of the decision of 21 July 2000 as notified to him on 28 August 2000, the Director General's decision of 13 September 1999 and the report of the Joint Appeals Board. He also asks the Tribunal to acknowledge and confirm the Agency's breaches of the Staff Rules and Regulations and its reliance on arbitrary decisions, failure to follow due process, abuse of authority, and that it took measures to undermine the rights of the staff and their means of redress. He claims material damages in an

amount equal to the difference between the remuneration and benefits he received as a P.3 official and what he would have received at grade P.4 between 1987 and 1999, or else an equivalent lump-sum payment reckoned on the basis of his last salary. He claims 30,000 United States dollars in moral damages and 5,000 dollars in costs.

C. The Agency replies that the complaint is irreceivable. The complainant waited until 5 March 1999, almost a year after he signed his last contract extension, before challenging the grade the Agency gave him on appointing him in 1984. His claim is therefore time-barred. Having received the Director General's final reply to his appeal on 6 July 1999, he ought to have challenged it within one month of that date, but he did not go to the Joint Appeals Board until "almost three months later". And although he asserts that he received the Director General's final decision on 1 August 2000, not until 13 November 2000 did he challenge it before the Tribunal. His complaint is therefore irreceivable under Article VII(2) of the Tribunal's Statute.

Citing Judgment 1808 (*in re Mesfin*), the Agency submits that the complainant's plea about his performance should be dismissed, since "grading turns on the duties of the post, not on the quality of performance". The transfer of a P.4 post from the Latin America Section to another section was a separate decision, unrelated to the issue of grading. As to the alleged shortcomings and mistakes in the Joint Appeals Board's report, they are immaterial: this complaint is about the Director General's final decision and not the Board's deliberations. His allegation of an incident involving the Director of his division should also be dismissed, as he offers no evidence in support. The same goes for his argument concerning the "zero growth" policy as it is pure speculation. Lastly, the Agency points out that a job evaluation study carried out in the Department of Technical Co-operation between October and December 1998 indicated that the complainant's post should be maintained at grade P.3.

D. The complainant rejoins that the Agency's pleas are devoid of merit. Its decisions showed procedural flaws, mistakes of fact and of law, misuse of authority and prejudice. They also overlooked essential facts and drew mistaken conclusions from the evidence.

As to receivability, he maintains that his extensions of appointment were not actionable administrative decisions within the meaning of the Staff Rules but merely "offers in the legal sense". He points out that since his supervisors had been promising since 1987 to get his post upgraded, he saw no need to take any other action. He could not appeal until he got a final and express decision from the Director General, and he received one only on 13 September 1999. The Board having raised no objection to receivability, his appeal was in time. Similarly, the Board's report, which should have been sent with the letter of 21 July 2000, reached him only on 28 August. Consequently, that was the date from which the time limit started to run, so he did comply with the time limit set in Article VII of the Tribunal.

On the merits the complainant observes that he raised the matter of the quality of his performance simply to disprove any notion that his work was at the root of the Agency's failure to take proper and timely action. In his submission there was no reason to transfer to another section the P.4 post he could have applied for. He sets out to prove that he did suffer discrimination and unfair treatment because of the incident involving the Director of his division. He alleges breach of process in the treatment of his requests for reclassification.

E. In its surrejoinder the Agency presses its pleas. It maintains that the classification procedures were correctly followed from start to finish. The complainant is mistaken in his assertion that the letters extending his appointment contain no decisions about his grade. As to the transfer of the P.4 post, it was a regular transfer under the Agency's Administrative Manual. Lastly, for several of his pleas the complainant offers not a shred of evidence.

CONSIDERATIONS

1. The complainant served the IAEA from 24 June 1984 until 30 November 1999, when he retired. He was recruited at grade P.3 and asked the Agency several times to upgrade his post to P.4 or appoint him to some other post at that level, but to no avail.

2. On 5 March 1999 he asked the Director General to organise a thorough review of his case and to upgrade his post to P.4 as from February 1987, the date on which he was first assigned duties and responsibilities at P.4 level. The Director General replied on 23 April 1999 that he had sent on his request to the Division of Personnel, which would examine his case in consultation with the Department of Technical Co-operation. The Director General informed the complainant on 6 July that he had received a report from the two departments concerned. He said that the complainant's appeal was time-barred for although he had signed numerous contract extensions specifying that his grade was P.3, he had not challenged any of them. Furthermore, he had been asked to do work of a higher level only occasionally and for short periods, his substantive duties remaining unchanged. In conclusion the Director General said that a recent job classification study in the Department of Technical Co-operation showed that an upgrading of his post was not warranted, but that the Administration had several times expressed its appreciation of his work.

3. In a letter of 3 August 1999 to the Director-General the complainant asked for a review of that position. The Director General replied on 13 September 1999 that he saw no reason to upgrade the post and that he should have gone to the Joint Appeals Board. The complainant filed an appeal on 17 September 1999, in which he reproduced all his previous arguments and claimed the quashing of the decision notified in the Director General's letter of 13 September 1999.

4. The Board met eleven times and considered all aspects of the case. On 30 June 2000 it recommended upholding the decision of 13 September 1999 not to upgrade the complainant's post to P.4. More generally, it advised the Administration to make its classification procedures more transparent and to avoid writing contradictory statements and raising false hopes in staff performance reports.

5. The complainant has come to the Tribunal seeking the quashing of the Director General's decision of 21 July 2000 to uphold the one of 13 September 1999 not to upgrade his post. He also asks the Tribunal to quash the report of the Joint Appeals Board and to acknowledge recurrent

breach of the Staff Rules and Regulations by the Agency. He claims redress of various kinds, including compensation equal to the difference between the salary and benefits he would have received between 1987 and 1999 at grade P.4 and those he actually received at grade P.3.

Receivability

6. Insofar as the complainant is seeking the quashing of the Joint Appeals Board's report, his claims are irreceivable because the Board has authority to make only recommendations, not decisions. In support of his claims against the Director General's decision the complainant is no doubt entitled to cite procedural flaws in the Joint Appeals Board's treatment of his case. That plea will be addressed below in the discussion on the merits. His claim to the quashing of the Board's recommendation, however, fails.

The same applies to his claim to a review of his career since 1987, the date when the work of his section was reorganised. As the Agency points out, the complainant had had the opportunity to challenge in time the refusal to upgrade his post; but on six occasions – most recently on 29 April 1998 – he accepted the contract extensions offered to him without objecting to the fact that they were offered at the same grade.

However, the Tribunal will entertain on the merits his claim to the quashing of the decision of 21 July 2000 to uphold the one of 13 September 1999 refusing to upgrade the post.

The Agency submits first that the complaint is out of time because it was filed on 13 November 2000, in other words more than ninety days after the decision was notified – on 1 August 2000. The evidence shows, however, that the notification was incomplete because it did not include the Joint Appeals Board's recommendation, which was to have been attached to it. The complainant did not get the Board's report until 28 August 2000.

Secondly, as the Agency rightly points out, the decision of 13 September 1999, challenged before the Board, largely upholds the one of 6 July. But unlike the latter it states formally that, on the basis of all the evidence, the Director General "[saw] no reason to reclassify the post". That was the final and challengeable decision, and the complainant appealed

against it within the time limits, as the Board concluded after thorough investigation.

The merits

7. What prompted the present dispute was the complainant's memorandum of 5 March 1999 seeking reconsideration of his case with a view to reclassification of his post. The Administration agreed in its letter of 23 April 1999 to re-examine the matter. Though he was not entitled to seek a review of his whole career, there was nothing to prevent the complainant challenging his grade and, if his claim was warranted, seeking compensation.

8. The complainant alleges several flaws in the Joint Appeals Board's report. But his pleas on that score cannot be sustained. The way the Board's secretary was appointed and the way the investigation was conducted disclose no flaws liable to affect the report or influence the impugned decision. As to the alleged inconsistencies or mistakes the complainant picked up in the Board's lengthy report, even if proven they could have no bearing on the lawfulness of the recommendation.

9. The complainant mentions several times that his work was found to be good, and the Agency does not demur. That, however, is immaterial to the grading of his post (see Judgment 1808). He also asserts that the Agency could have had several opportunities to assign him to a P.4 post. But to take up his plea would imply reviewing decisions that went unchallenged and which may not be cited in support of claims against the decisions taken in 1999 not to upgrade his post.

10. The gist of the complainant's argument is that he performed P.4-level duties, that his supervisors acknowledged as much several times in the course of his career and that the Agency should therefore upgrade his post accordingly. The Joint Appeals Board, however, which examined the case very thoroughly found no flaws in the classification procedure, and the Tribunal endorses that finding. It should be added that a job evaluation study was carried out between October and December 1998 in the Department of

Technical Co-operation, which looked at P.3 posts such as that of the complainant. The Director General approved the findings of that study on 19 March 1999; they afford no grounds for doubting that the complainant's post was correctly graded.

11. As to his pleas challenging the Agency's impartiality and recounting incidents which he sees as evidence of discrimination and unfair treatment, they are mere allegations and cannot be sustained. What would appear to be beyond doubt is that his work was appreciated. Indeed the Director General said so in his letter of 6 July 1999. In all likelihood his good performance appraisals were what prompted expectations that his duties and his post might be upgraded to P.4.

12. Lastly the complainant objects that a number of documents were disclosed neither to him, nor to the Joint Appeals Board nor to the Tribunal. He sees that as discriminatory and as a breach of the Staff Rules and Regulations and good faith. The Agency refutes the plea citing, appositely, the rules on protection of information about other members of staff. As to the rest, there is nothing in the evidence to suggest any breach of the rule that proceedings must be adversarial.

13. It follows that the complainant's claim to the quashing of the decisions he challenges cannot succeed. Nor, therefore, can his claims to compensation for the injury caused by the flaws he alleges.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

NINETY-SECOND SESSION

In re Vollering (No. 21)

Judgment No. 2114

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-first complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 6 October 2000 and corrected on 14 November, the EPO's reply of 16 February 2001, the complainant's rejoinder of 23 March, and the Organisation's surrejoinder of 24 April 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1952, is a patent examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, in The Hague.

On 5 March 1998 the complainant and another Dutch colleague sent a letter to a member of the Dutch parliament. On the same day the complainant forwarded a copy of the letter to approximately 100 Dutch staff members of the Office via the internal electronic mail system "Office Vision" (OV). On 24 March the Principal Director of Personnel in DG1 informed the complainant that the contents of the letter could cause discord

in the EPO Administrative Council and tension among certain delegations, thus breaching a statutory obligation under Article 14 of the Service Regulations for Permanent Employees of the European Patent Office, which requires staff to conduct themselves solely with the interests of the EPO in mind. He added that, since disciplinary action against the complainant was being considered, he would be given an opportunity to be heard on 31 March. On that day the complainant was heard by the Vice-President in charge of DG1 and the Principal Director of Personnel. The complainant was given ten days to submit his comments in writing, which he did on 8 April 1998.

On 8 July the President of the Office informed the complainant that, although he viewed the complainant's written comments of 8 April as an apology, he considered nevertheless that by writing and sending the letter – as well as forwarding it – the complainant had not kept his obligations as a staff member under Article 14(1) of the Service Regulations, had ignored his duty, under Article 16(1), to abstain from any act and expression of opinion which may reflect on the dignity of his office, and had ignored the obligation of discretion under Article 20. Consequently, the President imposed a reprimand on him.

The complainant appealed against this decision to the President on 2 October 1998 requesting him, in particular, to withdraw the disciplinary measure. In the event that his request could not be granted, he asked that his letter be considered as the lodging of an appeal. The Director of Personnel Development informed the complainant on 14 October that the President could not grant his request and had referred the matter to the Appeals Committee. In its Opinion of 10 June 2000 a majority of the Committee considered that the complainant had, indeed, breached his obligations under Articles 14 and 16 – but not under Article 20; it recommended rejecting the appeal as unfounded. In a dissenting opinion a minority considered that the reference to Articles 16 and 20 in the letter of reprimand constituted a procedural flaw, insofar as these articles did not form the subject matter of the 31 March hearing, and the complainant had been deprived of his right to be heard on those charges; on this ground the minority considered that the reprimand should be withdrawn. In a letter of 18 July 2000 the Principal Director of Personnel informed the

complainant that the President of the Office had rejected his appeal. That is the impugned decision.

B. The complainant submits that even though Article 94 of the Service Regulations gives the appointing authority the right to issue a reprimand without consulting the Disciplinary Committee, in his case the disciplinary procedure and the impugned decision were tainted by several procedural and substantive flaws. First, there was an abuse of his right to prepare a proper defence. He was given only five days to prepare before the hearing, but contends that in using the time limits provided in Article 101.1 by analogy, he should have been given fifteen days. Also, the letter of 24 March 1998, informing him that disciplinary action might be taken against him, contains incorrect facts. It refers, in particular, to an OV-note of 11 March which never existed: the complainant denies having sent such a note, on that day, to a large number of colleagues. Furthermore, he asserts that the President's decision to sanction him no longer refers to the letter addressed to the Dutch parliament member. The complainant concludes that the disciplinary measure "is therefore not receivable".

There was a breach of his right to be heard. He was heard before the Vice-President in charge of DG1 but the disciplinary sanction was issued by the President. In the complainant's view the decision was taken without a reasoned report, and he was not given the proper opportunity to be heard, thus breaching Articles 94 and 102 of the Service Regulations. Additionally, under Article 102 the sanction should have been taken within one month but the President's decision was taken some three months after the 31 March hearing. Consequently, his "right to have the decision in time" has also been breached.

There was also a breach of his right to defend himself. On 24 March he was informed of the possibility that disciplinary action would be taken against him for a violation under Article 14 of the Service Regulations and the minutes of the 31 March 1998 hearing make reference to the same. But, in the President's letter of 8 July, violations of Articles 16 and 20 were added and the complainant was never given an opportunity to defend

himself against these accusations. He considers that for a disciplinary measure to be valid it must be based on the correct article.

The complainant submits that there was no public discredit arising from his actions and the Administration failed to prove such discredit. Only the letter informing him of the 31 March hearing refers to the Dutch parliament member. The President's letter inflicting the reprimand refers to the fact that he distributed the letter to colleagues, but this, for the complainant, does not constitute public distribution; the Organisation cannot now, retroactively, base the disciplinary measure on that reason. Furthermore, by virtue of their own status, members of parliament are under a duty to keep confidential the contents of information they receive unless the parties concerned agree to make it public. As the contents of the letter were not made public there was no effect on the dignity of the Office.

He submits that there has never been any proof that delegations of the EPO Administrative Council were aware of the letter or that any tensions were created by it. However, he points out that the Netherlands is a member State of the EPO and that its delegation in the Administrative Council is instructed by the Dutch government. It is therefore in the EPO's interest that the Dutch parliament remains informed about "facts and concerns". As a Dutch citizen, he has a right, and even a duty, to communicate freely with members of parliament.

Any content alleged as "discrediting" in the letter comes from a misinterpretation arising from the EPO's translation. That translation, the complainant asserts, is inaccurate. He has provided a translation of his own which, he submits, is quite different and more accurate. The motive and intent of the letter to the member of parliament were to provide information and initiate discussion on an article of the Service Regulations of interest to Dutch employees. He never intended to create any tension in the Administrative Council or between that body and the Office.

The complainant asserts that as a citizen of the European Union he enjoys freedom of speech; that not only means his statements were permissible, but he cannot be disciplined for them. He provides several reasons why he believes that the disciplinary measure was based on hidden grounds and amounts to an abuse of power and censorship. He has asked

the Administration to insert in his personal file his letter of appeal of 2 October 1998 against the imposition of the reprimand, but his request has been refused. This constitutes a breach of Article 32 of the Service Regulations.

He asks the Tribunal: (1) to quash the President's decision of 18 July 2000 and order compensation of 50,000 Dutch guilders for moral injury suffered; (2) to condemn the President for "abuse of power" arising from his refusal to insert the complainant's letter of 2 October 1998 into his personal file and to impose a financial penalty on the President for the "waste of time and money" caused by the "pursuit of the abusive and unnecessary use of [the President's] discretionary power"; (3) to condemn the EPO for abuse of process and substantial procedural violation shown in the Appeals Committee's majority opinion and to order compensation to the complainant of 10,000 guilders for the moral injury suffered; and (4) to order compensation of 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is irreceivable in part. The complainant's claim that the President be censured for an alleged abuse of power was not made during the internal appeal and his claim to moral damages was not pursued in his internal appeal or during the Appeals Committee hearing. In its opinion the only receivable claims are to the quashing of the President's decision and costs.

Notwithstanding the issues of receivability, the Organisation argues that the entire complaint is without merit. The reprimand was not based on an incorrect fact. In his letter of 24 March 1998 the Principal Director of Personnel clearly referred to the letter the complainant sent to the member of the Dutch parliament in addition to its electronic mail distribution to staff members. There was unanimous agreement in the Appeals Committee that there could be no doubt as to what constituted the act on which the reprimand was based. Furthermore, the complainant never mentioned in his internal appeal that the Principal Director's letter contained, by mistake, the wrong date of the OV-note.

The EPO contends that the complainant's letter was not misinterpreted. In it he identifies an individual, by name and nationality, as well as a national delegation in the Administrative Council. By doing

so he created a "risk of irritations" and breached his obligations as a staff member under Article 14. His argument that the real aim of the letter was to draw attention to an article of the Service Regulations of interest to Dutch staff members cannot serve as a mitigating circumstance, particularly as the EPO considers that the letter contains "derogatory remarks". Furthermore, the complainant's explanations in defence of his translation are both unconvincing and contradictory. In this regard the Organisation points out that one of the members of the Appeals Committee – and one who signed the majority opinion – was able to read the original letter and evaluate the complainant's arguments.

Contrary to the complainant's assertion, the mere sending of the letter to a member of parliament made its contents public, and consequently violates the obligations set out in Article 14. Furthermore, there is a firm line of precedent in the Tribunal's jurisprudence which establishes that an international civil servant's freedom of expression is not unlimited: the obligations set out in Articles 14 and 16 of the Service Regulations are an embodiment of proper limitations to freedom of expression. It points out that no reference is made to Article 20 in the President's impugned decision, so the complainant's argument regarding that article is no longer justified.

It denies that there was any flaw, procedural or otherwise, in the imposition of the disciplinary measure. The measure applied did not breach the principle of proportionality and the complainant's rights were respected during the disciplinary procedure. The analogy to Article 101.1 drawn by the complainant is misplaced: he bases it on the procedures to be followed for more severe disciplinary sanctions. His assertion that the disciplinary measure was based on "hidden grounds" is unfounded.

D. In his rejoinder the complainant refutes the EPO's statement that he did not pursue his claim to moral damages. He points out that it was indeed put forth in his appeal and that "claims originally put forward are maintained, unless the complainant explicitly drops them". Furthermore, he is not in a position to provide proof of what was or was not said during the Appeals Committee hearing because he has been denied access to the tape of the hearing.

He enlarges his claims to include a request that the Tribunal condemn the EPO for the "abuse of process" arising out of the refusal to provide him with the tape of the hearing or transcript and to order compensation of 5,000 guilders in moral damages in this regard.

E. In its surrejoinder the Organisation asserts that after having made a claim for moral damages in the letter lodging his internal appeal the complainant did not reiterate this claim in any other submissions. Nevertheless, it submits that since his main claim - to set aside the impugned decision - is unfounded, the claim for moral damages must be rejected by the Tribunal. It also points out that even the dissenting members of the Appeals Committee, who would have recommended in favour of the complainant's claim to the quashing of the decision, felt that there would be "no further justification for the payment of moral damages". As for the new claim to moral damages set out in his rejoinder, it is irreceivable and unfounded.

CONSIDERATIONS

1. The complainant, a Dutch citizen, addressed a letter dated 5 March 1998 to a member of the Dutch Parliament. On the same day the complainant transmitted to his Dutch colleagues, via the Office's internal electronic mail system (OV), the text of that letter.

2. At a hearing on the matter, which took place on 31 March 1998, the complainant was invited to explain his position in writing, and he did so.

3. By a letter of 8 April 1998, addressed to the two officials who had been present at the hearing, the complainant stated that it had never been his intention to create any tension or discontent between the Administrative Council and the Office. He concluded by expressing the belief that no grounds existed for statutory measures to be taken by the Office and hoped that the matter could be regarded as settled.

4. The President, in a letter dated 8 July 1998, imposed on the complainant the "mild disciplinary measure of a reprimand". He based the reprimand on the following grounds: that by sending the letter of 5 March 1998 the complainant had publicly discredited a national delegation of the Administrative Council by using information which was by no means substantiated; accordingly, he had not respected his general obligations as a staff member under Article 14(1) of the Service Regulations; he had ignored his duty to abstain from any act, and in particular, any public expression of opinion which may reflect on the dignity of his office, under Article 16(1); and that he had ignored his obligation to exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties, under Article 20.

5. The disciplinary action was taken by the President on the basis of Article 94(1) of the Service Regulations which authorises him to issue a written warning or a reprimand without consulting the Disciplinary Committee.

6. Following an appeal filed by the complainant on 2 October 1998, the majority of the Appeals Committee, in its opinion of 10 June 2000, recommended that the appeal be rejected as unfounded.

7. The salient points of this opinion are as follows:

- (a) The reprimand was based on the fact that the complainant sent a letter to a member of the Dutch parliament which contained remarks which could cause discord in the EPO Administrative Council and tension between a national delegation on the Council and the Office; it was not, as the complainant insists, based on his transmittal of this letter to a number of his colleagues via an OV-note.
- (b) By distributing this letter, the complainant failed to comply with Article 14(1) of the Service Regulations which requires that a permanent employee conduct himself solely with the interests of the EPO in mind; he also failed to comply with Article 16(1) of the Service Regulations which states that a permanent employee "shall abstain from any act and, in particular, any public expression of

opinion which may reflect on the dignity of his office". The letter in question was a public expression of opinion which was not protected by freedom to express one's opinion as it contained discrediting statements which could have been detrimental to the Office's reputation.

- (c) The choice of disciplinary measure lies within the proper exercise of discretion of the appointing authority; in this case, the President, in imposing a reprimand – a mild disciplinary measure – exercised such discretion correctly.
- (d) The general procedural safeguards were observed even if the Disciplinary Committee was not consulted. These safeguards included the right for the complainant to be informed of the allegations against him, a reasonable period of time for him to prepare his defence, and the right to be heard.
- (e) As regards the complainant's request to put his letter of 2 October 1998 in his personal file, it was assumed that the Office would proceed in accordance with Article 32(1) of the Service Regulations, which provides that the personal file contains all documents relating to a permanent employee's administrative position and any comments by him on such documents.

8. The President of the Office endorsed the recommendation of the Appeals Committee to dismiss the appeal as unfounded and in a letter of 18 July 2000 the complainant was so informed. This is the decision that the complainant impugns.

9. The complainant perceives his writing of the letter as a legitimate exercise of his freedom of expression.

In this connection, however, his position in the EPO as a patent examiner does not call for him to communicate with a member of his national parliament.

10. The EPO cannot be faulted for condemning this act as going beyond the boundaries of freedom of expression, for such a right of international civil servants cannot be regarded as being without limit.

Indubitably, the complainant failed to comply with his obligations under Article 16(1) the Service Regulations to "abstain from any act and, in particular, any public expression of opinion which may reflect on the dignity of his office". He also failed to comply with the obligations under Article 14(1) of the Service Regulations to "carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind".

11. The complainant's remarks about a national delegation not only tend to cause embarrassment to the Office, but could also have led to tension in the Administrative Council contrary to the interests of the EPO.

12. In expressing his opinion regarding developments within the EPO to a member of parliament, the complainant seems to assume that it is the role of national parliaments to control the actions of international organisations. This betrays an attitude on the part of the complainant which undermines the independence of the international civil service of which he is part.

13. The complainant cannot exculpate himself from the consequences of his misconduct by acknowledging in his letter of 8 April 1998 that he may not have been fully aware of the fact that his actions failed to come up to the standards laid down in the Service Regulations, or that he did not intend either to discredit a member of the Administrative Council or to damage the reputation of the EPO. However, this statement was taken by the President of the Office as an apology and was thus a mitigating factor in the imposition on the complainant of a mild disciplinary measure, a reprimand.

14. When the measure takes the form of a reprimand, the Tribunal will exercise a limited power of review. It will not interfere "unless the measure was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts". (See Judgment 274, *in re Connolly-Battisti* No. 2, under 2.)

15. In this case, none of the above grounds was present and the President had the authority to impose the reprimand. Considering the evidence, he did not overstep the boundaries of his authority and there was no abuse of power.

16. The charge that the investigation procedure was flawed cannot be seriously entertained for the facts reveal that the complainant was informed in advance of the allegations against him and that consideration was being given to taking disciplinary action against him and that this could possibly extend to a reprimand. In the letter from the Principal Director of Personnel, the complainant was given the opportunity to be heard at a hearing and was informed of its date and venue. Furthermore, he was given ample time to prepare his defence, along with ten days after the hearing to submit his comments in writing. The time limits laid down in the Service Regulations for disciplinary proceedings were not applicable since the Disciplinary Committee was not involved in the case.

17. Since the principal claim fails, the subsidiary claim for moral damages also fails.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN

Florida Ruth P. Romero

FLORIDA RUTH P. ROMERO

Catherine Comtet

CATHERINE COMTET



NINETY-SECOND SESSION

In re O'Reilly

Judgment No. 2115

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Dermod Joseph Kavanagh O'Reilly against the European Patent Organisation (EPO) on 6 October 2000 and corrected on 31 October 2000, the EPO's reply of 25 January 2001, the complainant's rejoinder of 27 March, and the Organisation's surrejoinder of 13 June 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a British national and was born on 22 June 1940. He joined the staff of the European Patent Office, the EPO's secretariat, on 1 January 1989 as a search examiner at grade A3. This complaint stems from three internal appeals filed by the complainant.

In July 1993 the complainant objected to the "productivity norm" of 2.5 days per file which applied to him in 1993 and would be taken into account in his staff report. A conciliation procedure ensued and in a letter

of 10 June 1997 the new Principal Director of Search informed him that no reason had been found to change the norm. In a reply of 7 July the complainant asked him to reconsider his stand on the matter, but the Principal Director told him in a letter of 20 August that the norm had been correctly set. In a letter of 7 November 1997 to the President of the Office, the complainant notified his wish to appeal against that decision "for conservatory reasons"; he would substantiate his appeal if the outcome of a conciliation procedure on his 1993 staff report adversely affected him. In a letter of 11 March 1999 he confirmed that he would like his appeal to be heard "as soon as possible". It was taken up by the Appeals Committee under the reference RI/100/97.

The complainant had received his staff report for 1993 in July 1994, and since he had obtained the marking "less than good" for "productivity", "attitude ..." and the "overall rating" he had contested the report. On 25 May 1998, as a result of the conciliation procedure, he was given a third amended version of his report in which only productivity was rated "less than good". He had also contested his staff report for 1994-95, which led to further conciliation. He was given a second amended version of that report on 27 May 1998. The marking therein was "less than good" for productivity and "good" for all other categories. No final agreement was reached on either report and on 11 December 1998 the President endorsed both as they stood. By a letter of 11 March 1999 the complainant filed an internal appeal against both staff reports, which was registered under the reference RI/32/99.

On 2 July 1998 the President had published a list of employees to be promoted. The complainant's name did not appear on the list. In an internal appeal filed on 10 September 1998 he opposed the decision not to promote him. That appeal was registered as RI/84/98.

The Appeals Committee reported on all three appeals in a single report dated 6 July 2000. Contrary to the view held by the Administration, the Committee concluded that the complainant's appeal against the productivity norm was receivable, but recommended rejecting it as unfounded. It recommended allowing his other two appeals in part. In its

view the staff report for 1993 was "grossly inconsistent" in that the report comments were at odds with the box markings; it found that both reports should be drawn up again and the productivity rating for the period 1994-95 should be raised to "good". However, it thought that the Promotion Board should take the matter up "as speedily as possible" and that it would be advisable to forgo a further revision of the comments in the reports and ask the Promotion Board to give its opinion solely on the basis of the box markings.

In a decision of 8 August 2000, which the complainant impugns, the President rejected the appeal regarding the productivity norm. He agreed that the assessment for productivity in the 1994-95 report should be raised to "good". In view of the complainant's non-promotion, he stated that he was willing to submit the reports for 1993 and 1994-95 to the Promotion Board so that it could review the complainant's case on the basis of the box markings alone and sought the complainant's agreement. In a letter of 14 September 2000 the complainant gave his agreement, imposing two conditions: he wished to reserve his right to challenge several points in the Appeals Committee's report and wanted the Board to see only the box markings and not the written comments. The complainant was promoted to grade A4 with effect from 1 January 2000.

B. Citing the case law of the Tribunal, the complainant lists four grounds that justify not approving a staff report. These being namely: if a reporting officer made an obvious mistake of fact over some important point, neglected some essential fact, was grossly inconsistent or showed prejudice. In his case these factors were disregarded and led to the filing of his three appeals.

He submits that his appeal filed against the productivity norm was filed in due time, and he contests the stance of the Appeals Committee on some points. Contrary to the Committee's opinion he argues that his appeal was well founded. The administration did not take into account the degree of technical difficulty associated with the fields in which he worked: he wanted more time per file. It seemed unfair that his tutor was allowed 3.2 days per file especially since they both worked in the same

technical field. Also, the norm conciliation procedure took too long, which "cast doubt" on its legality.

Turning to his appeal against his two staff reports, the complainant notes that the Appeals Committee found that both versions signed by the President on 11 December 1998 should be annulled on the grounds of gross inconsistency. He objects to the fact that the President proposed a compromise solution without referring to the illegality of the two reports. As regards his 1993 report, he disagrees with the Committee's view that the mark of "less than good" for productivity should be allowed to stand. In drawing that conclusion the Committee overlooked essential facts. With regard to his 1994-95 report he finds it odd that his reporting officer calculated his productivity without taking into account twenty-two search reports done in the latter part of 1995. He alleges prejudice on the part of the reporting officer. Communication had virtually broken down between them and in failing to address this matter, the EPO was in breach of its duty of care towards him.

With regard to his third appeal, he submits that the delays in the conciliation and staff reporting procedures had a "disastrous" effect on his promotion prospects, particularly as he could reasonably have expected promotion to A4 in 1992, or at the latest in 1993. Moreover, he still did not have a single valid staff report for the period from January 1993 to September 1996.

The complainant asks the Tribunal to quash the President's decision rejecting his appeal against the productivity norm for 1993, so that his rating for productivity is raised to "good" in his 1993 report. He seeks the annulment of that report and the one for 1994-95 and wants them replaced by "a record of performance" that does not "prejudice his career". He claims promotion to A4 retroactively from 1 January 1993 and back pay due, with interest; moral damages for procedural delays and for prejudice on the part of the reporting officer; and costs.

C. In its reply the Organisation contends that the internal appeal relating to his productivity norm was not filed in due time, rendering the part of the complaint based on that appeal irreceivable. In his letter of 20 August

1997 the Principal Director merely confirmed the information he gave the complainant in his letter dated 10 June, and yet it was not until 7 November 1997 that the complainant filed his internal appeal.

Turning to the merits, it argues that the length of the reporting procedure criticised by the complainant does not affect the validity of the productivity norm to be applied in the complainant's performance appraisal. Production requirements are different for tutors; tutoring duties have to be taken into account, so he cannot compare his situation with that of his tutor. The President adopted the Appeals Committee's subsidiary recommendation to submit the complainant's staff reports to the Promotion Board in their current state, and proposed that course of action to the complainant; it follows that the complainant's acceptance of that proposal can be interpreted as implicit acceptance of the norm applied to assess his productivity. It was a fair proposal, and given that there were differences of opinion between the complainant and his supervisor, setting aside and rewriting the reports "would not have made sense".

The EPO denies that the reporting officer showed prejudice towards the complainant and states¹ that the complainant's allegations are unsubstantiated. A staff member has a legitimate right to comment on his report but a reporting officer also enjoys wide freedom of expression.

As for his claim to promotion with effect from 1 January 1993, the EPO holds that promotion is not "a foregone conclusion": the conditions for promotion have to be met. Moreover, none of the complainant's arguments support his claim to an award of damages.

D. In his rejoinder the complainant takes up the matter of the receivability of his first internal appeal. He appealed against the productivity norm insofar as it was to be applied to his 1993 staff report. He received the amended version of the report, signed by the President on 13 January 1999, and since his "formal" appeal was lodged on 11 March 1999 it was receivable.

He affirms that it was precisely with a view to accelerating the promotion process that he agreed to the President's proposal. That was

the sole reason, and the Organisation cannot assume that he gave his acceptance on any other matter. Moreover, no promotion resulted from the President's proposal; he was promoted on the strength of his performance since 1997. He insists that he is entitled to have his staff reports drawn up properly.

The complainant asks the Tribunal to condemn the Organisation's use of "flawed and prejudiced" staff reports for 1993, 1994-95 and 1996, and wants a memorandum that was attached to his 1996 staff report to be removed from his personal file. While adhering to his main claim to retroactive promotion from 1 January 1993, he subsidiarily asks that – for reasons he lists – the effective date of his promotion should be brought forward to 1 January in either 1994, 1995, 1996 or 1997.

E. In its surrejoinder the Organisation maintains its argument as to the irreceivability of his internal appeal against the productivity norm; the date at which the complainant received his 1993 staff report can have no bearing on the admissibility of his first internal appeal. Although the President's referral of his case to the Promotion Board did not have the result that the complainant was hoping for, it does not mean that the proposal for the Board to consider his reports only on the basis of the box markings was in itself unfair. He is therefore barred from now claiming the redrafting of his reports.

Furthermore, his four subsidiary claims regarding the date of his promotion are unfounded. His ratings since 1993 show that it is only from 1 January 2000 that he fulfilled the conditions for promotion. His claim to the removal of the document from his personal file is not receivable because he has failed to exhaust the internal means of redress.

CONSIDERATIONS

1. Following the filing of three internal appeals, the complainant is now impugning a final decision by the President of the European Patent Office rendered on 8 August 2000. The internal appeals challenged

respectively the productivity norm which was applied to him for the year 1993, his staff reports for 1993 and 1994-95, and his non-promotion to A4. He was subsequently promoted to grade A4 in January 2001, with effect from 1 January 2000.

2. By the impugned decision the President, while rejecting the complainant's appeal relating to the productivity norm, adopted a suggestion of the Appeals Committee and proposed to the complainant that his other two appeals be disposed of by sending his 1993 and 1994-95 staff reports to the Promotion Board with a request that it consider only the box markings and not the written comments of the reporting officer. After an initial refusal, the complainant, on 14 September 2000, accepted this proposal subject to the condition that the comments would not be shown to the Promotion Board, and this was done. The complainant also at the same time purported to reserve his rights to contest a number of the opinions expressed by the Appeals Committee.

3. The complainant regards the President's final decision as a compromise solution and wants to raise matters that were mentioned in the Appeals Committee's report but not covered by the President in his decision. He says there were excessive delays in the norm conciliation procedure and he did not have adequate warning about the rating for productivity which would be given in his 1993 report. Essential facts were neglected and there was prejudice on the part of his reporting officer. In his claims he seeks the annulment of both staff reports, and moral damages.

The Organisation argues that the complaint is irreceivable in part, and unfounded in its entirety.

4. Notwithstanding the Appeals Committee's holding to the contrary, it is clear that the complainant's internal appeal relating to the productivity norm was irreceivable. One of his earlier objections regarding his 1993 staff report was precisely that his request for conciliation on the productivity norm had never been brought to a conclusion. The

Organisation had ultimately accepted that view and, on 10 December 1996, asked for the 1993 report to be reviewed. Accordingly, on 10 June 1997, the Principal Director of Search, wrote to the complainant confirming that there was no reason to change the productivity norm that applied for 1993. The complainant protested against that decision by a letter to the Principal Director, dated 7 July 1997, and requested reconsideration. On 20 August the Principal Director of Search wrote back, refusing to change his position. The complainant's internal appeal was filed on 7 November 1997 and specifically attacked the "decision" of 20 August.

It goes without saying that a refusal to reconsider an initial decision does not create a new right of appeal and does not set off a new time limit with respect to the earlier decision. Nor can the complainant argue, as he attempts to do in his rejoinder, that the internal appeal only attacked the application of the contested norm to his 1993 staff report since the final version of that report was not approved by the President until 11 December 1998, some thirteen months after the filing of his first internal appeal. It follows that that internal appeal was irreceivable as it was filed more than ninety days after receipt of the decision of 10 June 1997 and the complainant not having exhausted his internal remedies, his complaint to the Tribunal is also irreceivable.

5. As far as concerns the complainant's claims based on the alleged irregularities in the 1993 and 1994-95 staff reports, it is evident that they no longer have any substance and need not be dealt with in any detail. The complainant accepted the President's proposal that the Promotion Board should consider the matter of his promotion on the basis of upgraded box markings without being shown the written comments. This had the effect of removing all the unfavourable scores and remarks and ultimately the Promotion Board, in December 2000, recommended that the complainant be promoted with retroactive effect from January 2000.

A staff member cannot claim entitlement to promotion at a particular date and the complainant was in fact considered for promotion at the earliest possible time after the impugned decision was taken and in

accordance with the proposal which he had himself accepted. His purported reservation of his right to contest the Appeals Committee's opinions, whatever other effects it may have, cannot change his position before the Tribunal which does not have the power to alter the reports of that Committee.

6. The same considerations apply to the complainant's claim to be promoted retroactively. Not only did he not have any automatic entitlement to be promoted, but his acceptance of the President's proposal on 14 September 2000 that amended staff reports for the years 1993 and 1994-95 should be submitted to the Promotion Board necessarily implied that he could not be considered for promotion before the Board had examined the reports. Shortly thereafter the Promotion Board recommended his promotion to A4 and this was done with retroactive effect to January 2000. There is simply no substance to this aspect of the complaint either.

In view of the foregoing the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN

Florida Ruth P. Romero

FLORIDA RUTH P. ROMERO



Catherine Comtet

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Giordimaina

Judgment No. 2116

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Antonella Giordimaina against the Food and Agriculture Organization of the United Nations (FAO) on 29 June 2000 and corrected on 25 October 2000, the FAO's reply of 31 January 2001, the complainant's rejoinder of 19 March and the Organization's surrejoinder of 10 May 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen who was born in 1966, joined the World Food Programme (WFP), an autonomous joint subsidiary programme of both the United Nations and the FAO, on 4 August 1987 at grade G.1. She was employed as a temporary assistant under short-term appointments remunerated on a daily basis until October 1993 and on a monthly basis thereafter. On 1 January 1995 she got a fixed-term appointment as an office helper for three months which was extended several times. On 1 February 1995 the complainant was assigned, at grade G.1, to the post of clerk, which was at grade G.3, in the telex unit (later renamed the Telecommunications Unit) following the retirement of the previous incumbent. The post of clerk that she was occupying

was reclassified in 1996 at grade G.2/G.3 and the title changed to telecommunications clerk.

On 16 December 1996 the WFP published a notice of vacancy for the post of telecommunications clerk and the complainant applied for it. Pending the outcome of the selection process, her appointment was extended from 1 January to 28 February 1997, from 1 March to 30 April and from 1 May to 31 May with an extension until 30 June 1997.

The complainant and three other applicants were placed on the short list and interviewed. On 4 June 1997 the complainant sent the Director of the Human Resources Division a memorandum asking how far the selection procedure had progressed. On 27 August she filed an appeal with the Executive Director of the WFP objecting that the results of the interview had not been sent to her and that she had not got the appointment. Among other claims she sought reinstatement in her post. The Executive Director rejected her appeal by a letter of 24 September, explaining that following a decision to postpone filling the post, the vacancy announcement had been withdrawn on 26 May and the post had been reclassified. On 30 October 1997 the complainant went to the Appeals Committee, which reported to the Director-General of the FAO on 16 December 1999, recommending rejection. On 4 April 2000 the Director-General wrote to the complainant rejecting her appeal. That is the impugned decision.

B. The complainant accuses the Organization of bad faith and breach of several rules of the FAO Manual. She also pleads discrimination and abuse of authority: between 4 August 1987 and 31 December 1993 the FAO "strategically" interrupted the contractual relationship in order to bar her access to stable employment. In her submission she is entitled to a fixed-term appointment for the period in question and to reinstatement on a continuing appointment under Manual paragraph III.311.65. She further contends that by giving her fixed-term appointments of less than one year the FAO offended against Staff Rule 302.4112.

She pleads breach of the selection process in that the results of the interview were not notified to her. According to the Manual, the FAO was bound to go through with the selection procedure and to extend her

contract until it was completed. The FAO failed to inform her that it had withdrawn the vacancy announcement and reclassified the post. In her view, the FAO had to allow her the opportunity to apply for the post as reclassified and in filling the post it had to give her priority. She adds that the FAO failed to give reasons for the non-renewal of her appointment.

She asserts that she was given duties of a G.3 level on being assigned to the telex unit, yet was paid a G.1 salary. The Organization "obviously intended" to "exploit" her.

Lastly, she points out that the Director-General's final decision was not taken until nearly three years after she filed her appeal which in her view is an inordinate delay.

She asks the Tribunal to quash the decision of 4 April 2000 and to order her reinstatement as she prescribes. She also claims grade G.2 as from February 1994 and all her consequent entitlements. She claims 350 million Italian lire in moral damages and a sum not below 50 million lire in costs.

C. Citing the case law the FAO replies that the complaint is irreceivable as regards the period from 4 August 1987 to 31 December 1993. Had the complainant intended to challenge the alleged "contrived break" in the employment relationship on 31 December 1993 she ought to have done so within the time limit.

The FAO points out that the complainant's duties were of a temporary nature. It contends that it was right to give her short-term or fixed-term appointments, as they were what best suited the non-permanent nature of her duties. The allegations of abuse of authority are therefore unfounded. It states that fixed-term appointments end automatically at the expiry date set in the letter of appointment and no notice is required.

As to the allegation of non-observance of the selection procedure, the Organization observes that while the selection procedure was under way there was a review of the staffing structure in the Telecommunications Unit which led to the conclusion that new technology had made the post of telecommunications clerk superfluous. It was therefore reclassified as a clerk-typist post at grade G.3. In reply to her memorandum of 4 June 1997 a personnel officer telephoned the complainant to inform her that the

vacancy announcement had been withdrawn, that the post had been reclassified and that she lacked the necessary qualifications for it. The reclassification has to be seen in its context: the interests of the service dictated radical changes, so the post was reclassified for objective reasons not because of any bias against the complainant. Lastly, the fact that it extended her appointment pending the outcome of the selection process is evidence of the FAO's good faith and its wish to find a solution to her problem.

D. The complainant rejoins that the complaint is receivable. The refusal to renew her contract beyond 30 June 1997 was the only decision she could challenge and she did so within the time limit. If she had challenged any of its earlier offers of appointment the FAO would not have kept her on. In her view the case law cited by the FAO is irrelevant. She cites Judgment 752 (*in re Goldschmidt*), which allows the rule on time limits to be waived where the organisation has misled the staff member. That, she says, is exactly what the FAO did by renewing her appointment time and again. She denies that her duties were temporary. In her submission short-term appointments are warranted where there is a very heavy workload, but ten years on such appointments would seem to be an unduly long time.

She contends that, her memorandum of 4 June having gone unanswered, she did not find out until September 1997 that the post in question had been reclassified. By failing to announce that the post was to be reclassified and by appointing someone else to the post, the FAO showed discrimination against her and was guilty of abuse of authority.

E. In its surrejoinder the Organization presses its pleas including those regarding receivability. It denies discrimination: the complainant was simply not qualified for the post as upgraded. She was asked to perform duties corresponding to grade G.1 for as long as she was on a G.1 post. Not having asked her to undertake duties of a higher grade, to grant her a special post allowance would not be justified. The FAO explains that the Appeals Committee took as long as it deemed necessary to examine the complainant's case. After receiving the Committee's report the Director-General did take slightly more than three months to come to a

final decision, but that was not excessive. Neither the Staff Regulations nor the Staff Rules prescribe any time limit for such decisions.

CONSIDERATIONS

1. The complainant worked for the WFP from 4 August 1987 to 30 June 1997. Between 4 August 1987 and 26 October 1993 she did temporary work as a clerk, messenger, filing clerk and office helper under short-term contracts on a daily rate of pay. For example, her services were required at meetings of the WFP's Executive Board. As from 27 October 1993 she was paid at a monthly rate, again under short-term appointments. In 1994 she worked first part time then full time.

On 1 January 1995 she got a fixed-term appointment - which was renewed several times - as an office helper. On 1 February 1995 she was assigned to the post of clerk in the telex unit. She was to do temporary work pending a review of the description of the post of clerk and the publishing of the vacancy notice for that post which had fallen vacant at the end of 1994, when its incumbent retired. During that time the Organization embarked on a review of the structure of the complainant's unit, that had become the Telecommunications Unit. The post she was occupying was reclassified as a telecommunications clerk post at grade G.2/G.3 and put up for competition. She was kept in it temporarily and pending completion of the selection procedure her appointment was extended, up to 30 June 1997.

A vacancy announcement for the post of telecommunications clerk had been published in December 1996. The complainant and other WFP employees applied, but while the selection process was underway it became clear from the review of the staffing structure in the Telecommunications Unit that the post was no longer needed. On 26 May 1997 the vacancy announcement was cancelled, according to the Organization, and the post was reclassified as a post of clerk-typist at grade G.3. It was not put up for competition but filled by transfer on 30 June. The candidates who had answered the vacancy announcement were not informed of that. Moreover, it is neither alleged nor established that they were given any earlier indication that the post - while up for

competition - was being reviewed and reclassified, and so might be abolished. By a memorandum of 4 June 1997 the complainant asked the Director of the Human Resources Division what stage the selection process had reached. According to the FAO, she was given the information on 10 June 1997 by telephone. The complainant demurs; and the Organization provides no evidence of its assertion.

On 27 August 1997 the complainant filed an appeal with the Executive Director of the WFP citing the five following grounds:

- (a) the FAO failed to notify the results of the competition and inform her that she was not appointed;
- (b) it did not renew her appointment which, she asserts, amounts to discrimination;
- (c) breach of the provisions of Staff Rule 302.4112 which she also considers to be discrimination;
- (d) the discrepancy between the kind of work she was doing and the amount she was paid; and
- (e) non-payment of an end-of-service indemnity.

On 24 September 1997 the Executive Director informed the complainant that her appeal was rejected, and replied to each point she had raised in her appeal.

(i) She explained that the vacancy notice had been withdrawn on 26 May 1997 and that the post had been reclassified as a clerk-typist post at grade G.3 for which the complainant lacked the necessary qualifications, namely English at grade C level and a typing speed of fifty words a minute. An employee who did have those qualifications had been transferred to the post on 30 June 1997.

(ii) The complainant had pointed out to her that she had worked for the FAO for nearly ten years and that of all the employees given notice of non-renewal she was the only one whose appointment was actually terminated. The Executive Director denied that assertion: there had been other non-renewals. Moreover, although the complainant had served the FAO for ten years, until 1995 she had been under short-term contracts. The last one had been a fixed-term contract. She had no entitlement to

renewal. Besides, the reason for her departure was the abolition of the post to which she had been temporarily assigned.

(iii) There had been no breach of Rule 302.4112 since the complainant's fixed-term appointment had lasted for more than one year.

(iv) The complainant claimed that she had been paid a G.1 salary whereas her duties corresponded to the G.3 level. In fact she was employed in the Temporary Assistance Unit and had never been selected for a post by competition. A special post allowance is not paid unless the staff member's qualifications match those required for the higher post to which the staff member may be temporarily assigned. In this case the complainant had neither the necessary language skills nor the requisite paper qualifications. Her claim was therefore unfounded.

(v) No termination indemnity is due upon expiry of a fixed-term appointment.

On 30 October 1997 the complainant went to the Appeals Committee. In its report of 16 December 1999 the Committee recommended rejecting the appeal. The Director-General of the FAO endorsed that recommendation and so informed the complainant on 4 April 2000. That is the decision now under challenge.

2. The complainant is asking the Tribunal to quash the impugned decision.

Her main claim is to immediate reinstatement in her post on a continuing appointment with retroactive effect as from 5 August 1988, at grade G.2. She claims all the remuneration she was not paid due to the interruption in the contractual relationship which the Organization failed to substantiate, payment by the Organization of the contributions to her retirement pension and allowances for dependent children. Failing that she claims compensation and moral damages for "unwarranted loss of employment and the related career opportunities".

As subsidiary claims, she seeks reinstatement in her post on a fixed-term appointment for seven years at grade G.2, and payment, with interest, of all salary arrears from July 1997. She also claims payment by the Organization of her pension contributions.

At all events she claims grade G.2 as from February 1994 and, accordingly, payment, plus interest, of the difference between her earnings on grade G.1 and what she would have earned as a grade G.2 official from February 1994 to June 1997. She claims payment by the Organization of her pension contributions, "adjustment of the termination indemnity", moral damages and costs.

In support of her claims she puts forward various pleas which will be discussed below. Her first objection is to the non-renewal of her appointment; it was wrongful, should be set aside and the complainant should be reinstated. In her submission the length of her service entitles her to a continuing appointment. The FAO broke the rules by barring for several years her access to stable employment. From February 1995 to the end of June 1997, though paid at G.1 level she performed G.2-level duties, and so is entitled to "additional remuneration". In her submission the FAO seriously harmed her interests and should therefore pay her moral damages. In this connection she cites the slowness of the internal appeal procedure.

The Organization seeks the dismissal of the complaint: it is irreceivable as regards the period from August 1987 to December 1993. If she intended to challenge the alleged "contrived break" in the employment relationship from 31 December 1993, she should have done so within the time limit. On the merits the FAO contends that her duties being temporary, it was right to give her short-term and fixed-term appointments. Such appointments confer no rights. It denies any flaws in the selection procedure and submits that it had every right to withdraw the vacancy announcement because the post was no longer necessary. Moreover, it was reclassified and the complainant no longer qualified for it. The FAO adds that it showed no prejudice against her and, contrary to her assertion, the internal appeals procedure was not unduly long.

3. The complainant asks for several witnesses to be heard in connection with the selection process. That is unnecessary, since the facts are sufficiently established by the evidence.

The selection procedure

4. (a) According to the case law, an organisation may suspend or even cancel a selection procedure if its interests so warrant provided that there is no misuse of authority (see for example Judgments 1771, *in re* De Riemacker No. 4; 1982, *in re* Barret No. 3; and 2075, *in re* Pinto No. 4). The organisation is the judge of where its interests lie and the Tribunal recognises that an organisation has wide discretion in the matter. Misuse of authority may not be presumed and the burden of proof is on the party that pleads it.

The Organization's explanation as to why it withdrew the vacancy notice and reclassified the post would appear to be tenable and plausible. The complainant alleges discrimination but offers no evidence that the FAO tried to harm her in someone else's interest. There was nothing personal about the measure, it was simply a consequence of the restructuring, so the FAO did not impair the complainant's rights by putting an end to the selection procedure.

(b) The complainant has neither challenged the appointment of someone else to the reclassified post nor asserted that it could be filled only by way of competition.

She cannot therefore argue that it was in order to exclude her that the FAO reclassified the post and appointed someone else without holding a competition.

5. Relations between an organisation and its staff must be governed by good faith. Furthermore, an organisation must treat its staff with due consideration and avoid causing them undue injury. In particular, it must inform them in advance of any action that may imperil their rights or rightful interests (see, for example, Judgment 1756, *in re* Awoyemi, under 10(a) and the others cited therein; and for more recent cases, Judgments 2017, *in re* Toa Ba; 2051, *in re* Gupta No. 8; 2067, *in re* Annabi No. 2; and 2072, *in re* Fialkowski).

True to say, the FAO did observe those duties in that it extended the complainant's appointment until the date by which the post was to be filled. But it was cavalier in the way in which it informed her of what was

to become of the selection process. For the complainant it was particularly important that she be informed promptly whether she could expect to be appointed, so that she could start to look for another job if need be. She contends, and the FAO does not demur, that she had the more reason to be optimistic as she had been told unofficially that of all the applicants, she stood the best chance of being appointed. In these circumstances, the FAO ought to have put her in the picture at once, or in any event as soon as it became clear from the review of the staffing structure in the Telecommunications Unit that reclassification was a serious possibility for the post in question. But it did not – or at least the FAO neither alleged nor established the contrary. Thereafter, when a decision was taken on 26 May 1997 to withdraw the vacancy announcement, the Organization should have informed the candidates immediately. According to the evidence, the complainant was so informed in writing only on 24 September 1997, in other words nearly four months later. Even if, as the Organization contends, she was informed by telephone on 10 June 1997 written notification was nonetheless an obligation.

The complainant's personal interests have undoubtedly been harmed and some redress for the material and moral injury she suffered is warranted (see under 12 below).

Special post allowance

6. The complainant submits that as from 1 February 1995 although on grade G.1 she actually performed G.3-level duties.

The FAO retorts that the complainant held grade G.1 and the tasks that she performed as from that date were those she had been recruited to do; she was not working at a higher level. As the complainant herself says, she made no formal claim to a special post allowance as such.

Staff Rule 302.308 says:

*302.3081 Staff members are expected to assume, as a normal part of their work assignments and without extra compensation, the duties and responsibilities of higher-level posts for short periods (such as during sessions of the Conference or Council, or absences of other staff members).

302.3082 Staff members who are required to assume duties of higher-level posts for substantial periods of time may be paid a special non-pensionable post allowance as set out in the FAO Manual."

FAO Manual paragraph III.308.422 says that a proposal for the payment of a special post allowance must be submitted by the unit concerned to the department or office head for approval, accompanied by an explanatory memorandum.

No such proposal was submitted. However, since the Organization had its say on this matter and since, when she made her claim to the readjustment of her salary, the complainant was no longer regarded as a serving official, the Tribunal considers that the internal means of redress have been exhausted.

The Tribunal is satisfied on the evidence that, as the FAO argues, from 1 February 1995 the complainant was employed under fixed-term appointments to do temporary work as a clerk in the telex unit; so the duties she performed were not of a level higher than that of her post. The amount of her pay was that stipulated in the terms of her contracts and she did not challenge it when the contracts were concluded. Any claim filed in that connection outside the time limit would thus be irreceivable.

The plea fails.

*The complainant's claim to the
conversion of her appointments*

7. (a) The complainant asserts that the provisions of the FAO Manual entitle her to:

- (1) Conversion of her short-term contracts between 4 August 1987 and 31 December 1993 to fixed-term contracts, since in all they covered more than one year (Staff Rule 302.4112), the contract breaks being a mere device to prevent the rule from being applied.
- (2) Conversion of her fixed-term appointments into a continuing appointment after six years of continuing service on short-term or fixed-term appointments (Manual paragraph III.311.65).

According to the complainant, the Organization ought to have applied those rules automatically and must therefore do so with retroactive effect.

Since she could not have been expected to claim their application at the time, she can now seek retroactive application together with the entitlements that go with each type of appointment.

The Organization demurs. For the period from 4 August 1987 to 31 December 1993 the complainant could and should have challenged each decision on the grounds of breach of the above-mentioned rules. Since she failed to do so, her plea is time barred. On the merits the FAO denies breaking the rules in question.

(b) The complainant is arguing that as an employee – and thus in a weak position vis-à-vis the employer – for as long as she is under contract she cannot properly forfeit what she may claim by law. That thesis may find support in the domestic law on private sector employment contracts of some countries. But it is not expressed in quite the same way in international civil service law. According to precedent, in the interests of stable administration a decision which has taken effect unchallenged may not as a rule be challenged at some later date (see, for example, Judgments 1132, *in re Bakker* No. 2; 1413, *in re Feldmann*; 1554, *in re Tögl*; 1666, *in re Bedrikow*, under 5(b); and 1938, *in re Alvarez Vigil*, under 8).

Occasionally, and in exceptional circumstances where strict observance of that rule would be pedantic, the Tribunal has looked behind the documents to ascertain the intention of the parties. In Judgments 701 (*in re Bustos*) and 702 (*in re Giussi*), emphasising the exceptional nature of each case, the Tribunal found that in the circumstances, uninterrupted employment in the same post for more than eleven years was to be treated as a continuous whole and that its division into short-term contractual periods was fictitious, so notice was required in order for the contract to be terminated. In the case ruled on in Judgment 1385 (*in re Burt*) – in which the Tribunal referred to Judgment 701 – the issue was to be resolved as to whether an official on a short-term appointment could benefit from certain rules applying to fixed-term appointments. The official having completed one year of continuous service, the Tribunal found that the interruption of his appointment by an external collaboration contract was a “device” to circumvent the rule. It thus based its determination that

the rule must be applied on the parties' intention as expressed in the total length of the appointment.

(c) But the circumstances of the present case are not altogether exceptional. Although until October 1993 there was some continuity in the contractual relations, the length of service - remunerated on a daily basis - and the duties involved varied. The complainant herself concedes that during that period her contracts were initially for "casual work". But casual work is anything but continuous and lasting.

That being so, there is no alternative but to apply the fundamental rule that unchallenged administrative decisions are binding on both parties. Her claim to reinstatement cannot therefore succeed since she did not seek a formal review of her position at the time when she could have done so.

That applies generally, not just to the contracts and decisions pertaining to the period ending in December 1993.

(d) There remains, however, the issue of whether, when deciding on the category of contract to be awarded - on the basis of a completed period of continuous service in the past - the administration and the Tribunal are bound by the classification applied previously to a series of short contracts. The rule that an administrative decision which has become final or *res judicata* is not open to challenge does not in itself preclude applying the accurate legal classification at some later date, as when the contracts came into effect the parties had no reason to question their classification having no cause of action and hence no legal standing.

(e) According to Manual paragraph III.311.65 a continuing appointment is granted after six years of continuing service on short-term or fixed-term appointments with the Organization.

There is no need to determine whether, and to what extent, at the time of challenging the non-renewal of her appointment the complainant could plead breach of the above rule in claiming eligibility for termination under the rules governing continuing appointments.

Even supposing the above rule did apply to her, the Tribunal finds no breach of it. In the interests of efficient staff management an organisation must have a measure of discretion in applying a rule of this kind.

What has to be determined, therefore, is whether, when her appointment was extended for the last time, on 1 June 1997, or when the extension expired, on 30 June 1997, the complainant had completed six years of continuing service with the Organization. The requirement of continuing service was undoubtedly met for the period starting in early 1995. But there is some doubt as to early 1994, because at the time she was doing part-time work. There is even greater doubt regarding the period prior to that, when as she herself says, she was doing "casual work". In addition, there were several official contract breaks – understandable in view of the nature of her duties. In these circumstances, the Organization could rightly conclude in 1997 that she did not meet the requirement of six years of continuing service.

There was, therefore, no breach of Manual paragraph III.311.65.

(f) Since her appointment cannot be treated as an indefinite one, the complainant has no entitlement to a terminal indemnity, since under paragraph III.305.5123 fixed-term appointments automatically expire according to their terms, "without notice or indemnity".

The non-renewal of the appointment

8. What Rule 302.907 of the Staff Rules and Manual paragraph III.305.5123 are saying is that an appointment for a fixed-term will simply lapse with the passage of time. However, a steady line of precedent has it that a decision not to renew an appointment is an actionable one and so must fulfil certain requirements. One of them is that it must be accounted for. Moreover, the reasons must be conveyed in a timely manner so that the staff member may act accordingly. The staff member must also be given reasonable notice (see, for example, Judgments 1317, *in re Amira*, under 24, and 1583, *in re Ricart Nouel*, under 5, and the others cited therein).

In this case the complainant was given grounds for the decision, since the FAO had told her that her appointment would end once the vacant post was filled. However, the real reason for the non-renewal was the abolition of the post, which was not the reason conveyed to the complainant. For her, abolishing a post or appointing someone to it had different

implications. As long as the post was not filled all she needed to do was await the appointment since she thought she stood every chance of being the successful candidate. If, however, she had been given an indication of the abolition and upgrading of the post to a level for which she was not qualified, she could at once have set about challenging the decision or at least looking for alternative employment at the FAO or elsewhere.

Consequently, the Organization should have informed her sufficiently early of the real reason of the non-renewal. It did so only at the end of September 1997, yet the vacancy announcement had been withdrawn four months earlier and her contract had expired on 30 June. The impugned decision must therefore be set aside.

9. The FAO is not, however, under an obligation to reinstate the complainant (see, for example, Judgment 1317 and the others cited therein).

Although an organisation must abide by certain rules when not renewing an appointment, it is not barred from terminating a short-term or fixed-term appointment.

Consistent precedent says that non-renewal is at the discretion of the appointing authority. Such a decision is subject to only limited review, and the Tribunal may set it aside only if it was taken without authority, or in breach of a rule of form or procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority (see, for example, Judgment 1526, *in re Baigrie*, under 3, and the precedents cited therein).

Here, the non-renewal of the complainant's contract was a consequence of the abolition of the post she held temporarily. The Organization says that there was no other activity it could assign her to. These reasons are convincing. Misuse of authority is neither alleged nor established.

*Assistance in the complainant's search
for alternative employment*

10. The written submissions say little of the help the Organization afforded the complainant in looking for another job (on the existence of such a duty see Judgment 1526 and others cited therein).

Being satisfied with her services the FAO placed her name for one year on an electronic roster of candidates for vacancies.

The complainant alleges that she got no offers from the FAO and remained unemployed. But she gives no information about any steps she may have taken with a view to applying for jobs or taking part in competitions.

Nor does the FAO give any indication as to what posts may have been available or any offers it may have made.

The Tribunal finds no evidence that the Organization did not give the complainant the appropriate assistance.

The length of the internal appeal procedure

11. A staff member who files an appeal is entitled to expect a decision to be taken within a reasonable time. Since an internal appeal is a necessary prelude to judicial review, the Organization too must respect the need for expeditious proceedings.

In this case more than two-and-a-half years elapsed between the complainant's appeal to the Appeals Committee and the Director-General's decision to reject it. Circumstances and the nature of the case demanded an expeditious appeal procedure. Since, in the internal appeal, the complainant was challenging a decision not to keep her on and claiming reinstatement, she needed to know quickly what the outcome of the appeal would be. Indeed, her future to some extent depended on it. Though it raised some delicate issues, the case was not particularly complex. The conclusion is that the appeal was not sufficiently expeditious.

The amount of time usually needed to deal with such a case was far exceeded. As a result the complainant suffered injury warranting redress.

Redress

12. The Organization's omissions, noted under 5, 8 and 11 above, caused the complainant significant material and moral injury. For months she was left on tenterhooks about her job at the FAO. That naturally made her quite anxious and may have hampered her search for a new job.

In view of the complainant's last salary, the Tribunal considers that compensation in an overall amount of 15,000 euros including all interest as at the date of the present judgment constitutes fair redress.

13. Even though the complaint succeeds only in part, the costs must be borne by the FAO, whose wrongful conduct prompted the complaint.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The FAO shall pay the complainant compensation in an amount of 15,000 euros.
3. It shall pay her 6,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI HILDEGARD RONDÓN DE SANSÓ

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* Palma (No. 3)**
(Application for review)

Judgment No. 2117

THE ADMINISTRATIVE TRIBUNAL,

Considering the second application for review of Judgment 1665 filed by Mr Francesco Palma on 9 August 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1665 delivered on 10 July 1997 the Administrative Tribunal dismissed a complaint filed by Mr Palma, a former employee of the European Southern Observatory (ESO), against a decision by the Governing Board of the Pension Fund of the European Organization for Nuclear Research (CERN). He has filed a second application for review of that judgment alleging a mistake and asking to have it corrected. He nonetheless acknowledges that to quash the whole of paragraph 10, or a particular sentence of the judgment, would not affect "the substantial correctness of the decision of the CERN and of the decision of the Tribunal [which he] accept[s]".

2. As is plain from the terms used by the complainant, he is challenging not the operative part of the judgment, but one of the Tribunal's findings in its discussion of the pleadings.

That being so, his application for review is clearly irreceivable, as was his earlier application for review of the same judgment which the Tribunal dismissed in Judgment 1998 delivered on 12 July 2000. It is therefore dismissed in accordance with the summary procedure provided for in Article 7 of the Rules of the Tribunal.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

***In re* Palma (Nos. 26 to 32)
(Applications for review)**

Judgment No. 2118

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-sixth complaint filed on 7 August 2000 by Mr Francesco Palma, the twenty-seventh complaint filed on 12 August, the twenty-eighth complaint filed on 24 August, the twenty-ninth complaint filed on 18 September, the thirtieth complaint filed on 25 September, the thirty-first complaint filed on 30 September and the thirty-second complaint filed on 7 October 2000 against the European Southern Observatory (ESO), and which are applications for review of Judgments 1949, 1718, 1919, 1948, 1950, 2002 and 2001 respectively;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant is a former employee of the ESO. The Observatory did not renew his contract upon its expiry in 1995. Since then the complainant has come to the Tribunal on many occasions challenging his former conditions of employment. He has filed seven applications for review, of Judgments 1718, 1919, 1948, 1949, 1950, 2001 and 2002. The seven applications will be joined to form the subject of a single ruling.

2. The complainant submits that there are "new facts" warranting review of some of the judgments he has challenged in which, he says, the Tribunal has made errors of fact or omitted to rule on claims or disregarded principles deriving from its Statute or international conventions. There is nothing of that nature: the complainant merely enlarges on issues already examined in his initial complaints and in previous applications for review. Since he has failed to provide any evidence in support of his pleas, none of them can affect the final ruling handed down by the Tribunal.

3. The complainant's applications for review being clearly irreceivable, the Tribunal will dismiss them summarily under the procedure provided for in Article 7 of its Rules.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 12 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

NINETY-SECOND SESSION

In re Alvarez-Santullano (No. 2)

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Guillermo Alvarez-Santullano against the International Telecommunication Union (ITU) on 1 December 2000 and corrected on 22 January 2001, the Union's reply of 20 April, the complainant's rejoinder of 23 May and the ITU's surrejoinder of 6 July 2001;

Considering that by a letter of 24 October 2001 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 31 October 2001 the Union informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In re Alvarez-Santullano (No. 2)

In witness of this judgment, adopted on 6 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

MELLA CARROLL

JEAN-FRANÇOIS EGLI

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

NINETY-SECOND SESSION

In re Baron

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Stephanie Christine Baron against the World Health Organization (WHO) on 15 March 2001 and forwarded to the WHO on 19 March;

Considering that by a letter of 30 May 2001 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 4 June 2001 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In re Baron

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

James K. Hugessen

JAMES K. HUGESSEN



Catherine Comtet

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative*

NINETY-SECOND SESSION

In re Giorgi

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Santo Giorgio Giorgi against the World Intellectual Property Organization (WIPO) on 2 August 2001 and forwarded to WIPO on 14 August;

Considering that by a faxed letter of 10 September 2001 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 24 September 2001 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In re Giorgi

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative*

NINETY-SECOND SESSION

In re Lainas (No. 4)

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Vassilios Lainas against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 28 December 2000 and the Agency's reply of 5 April 2001;

Considering that by a letter of 9 August 2001 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 14 September 2001 the Agency informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In re Linaas (No. 4)

In witness of this judgment, adopted on 2 November 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

SEYDOU BA

CATHERINE COMTET

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